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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 199

JULIA V. MILLER, ADA V. MILLER, AND C. O. MILLER, PLAINTIFFS IN ERROR,

vs.

W. J. SCHOENE, STATE ENTOMOLOGIST

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

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IN SUPREME COURT OF APPEALS OF VIRGINIA

JULIA V. MILLER, ADA V. MILLER, and C. O. MILLER,
Plaintiffs in Error,

vs.

STATE ENTOMOLOGIST, Defendant in Error

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS AND ORDER ALLOWING SAME

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

The petition of Julia V. Miller, Ada V. Miller, and C. O. Miller respectfully represents that they are aggrieved by a final order and judgment of the Circuit Court of Shenandoah County, entered on the 22nd day of January, 1926, in a certain matter then therein pending under the style of State Entomologist v. Julia V. Miller, &c.

The proceeding in which said order and judgment was entered was one inaugurated by said Entomologist under Sections 885 to 893, inclusive of the Code, commonly referred to as the "Cedar Rust Statute," by a notice reciting that upon an examination made upon the request of ten or more freeholders of red cedar trees growing upon a tract of two hundred and twenty-five acres of land in said county owned by petitioners, it was found by said Entomologist that all of said cedar trees "are (or may be) the source, harbor, or host plants" for the disease known as "Cedar Rust of Apples," and that the same were growing within two miles of an apple orchard, and constituted a menace to such orchard, and requiring that within a time specified in the notice petitioners should destroy all of the red cedar trees upon said tract. From this notice and order of the Entomologist, petitioners within fifteen days of its service, as permitted by the statute, appealed to said Court, and upon the hearing of said appeal the order and judgment complained of was entered whereby it was directed that said Entomologist should cause all of said

red cedar trees to be cut down, and the sum of One Hun-
[fol. 2] dred Dollars was awarded to petitioners by way of damages. A transcript of the record of said proceeding accompanies this petition, from which will appear the foregoing facts, and those hereinafter stated.

Upon the hearing of said appeal, testimony on behalf of said Entomologist was introduced to establish the facts recited in his said notice, and tending to establish that the damage to be sustained by petitioners from the destruction of said cedar trees would not exceed the sum of One Hundred Dollars. On behalf of petitioners the evidence of three witnesses was offered to show that the damages which petitioners would suffer by the cutting down of said cedar trees would be not less than Five Thousand to Seven Thousand Dollars in amount, being the diminution in market value of the said land which would result from the cutting of said trees. (See Certificates 2, 3, and 4.) This evidence on behalf of petitioner was, on objection, excluded by the Court, and to that action petitioners duly excepted, as they did to said order and judgment.

At the trial petitioners, by their written statement of their grounds of defense, set up first, that the said sections of the Code—the Cedar Rust Statute—are unconstitutional and void because in contravention of the due process and equal protection of the laws, clauses of the Fourteenth Amendment of the Federal Constitution, and the failure of the Court to sustain this contention, it is submitted was gross error.

The only case arising under the statute here involved which has been before this Court, seems to have been Bowman v. Entomologist, 128 Va. 351, in which the statute was held valid as against certain contentions therein presented that it was opposed to both the State and Federal Constitutions, but some of the matters now to be presented were not passed upon by this Court in that case, and seem not to have been called to its attention.

Said Section 885 declares: "It shall be unlawful for any person * * * to own or keep alive and standing upon his * * * premises, any red cedar tree or trees which are or may be the source, harbor, or host plant for * * * cedar rust of the apple, and any such cedar trees, when growing within a radius of two miles of any apple orchard

* * * are declared a public nuisance, and shall be destroyed as hereinafter provided."

By Section 886 it is provided:

[fol. 3] "In any county * * * where the above mentioned disease exists, it shall be the duty of the State Entomologist * * * upon the request in writing of ten or more reputable freeholders, of any county or magisterial district, to make a preliminary investigation of the locality from which said request is received. * * * If upon such preliminary investigation of the localities from which said request is received it shall appear that there are red cedar trees which constitute the source harbor, or host plant of said disease, and that said cedar tree or trees exist within a radius of two miles of any apple orchard or orchards in said locality and constitute a menace to the health of said apple orchard or orchards, the State Entomologist * * * shall give notice in writing to the owner or owners of said cedar tree or trees to destroy the same * * * and the owner or owners shall within such time as may be prescribed in such notice * * * cut down and destroy said cedar trees."

By Section 889 it is provided that if the owner of the cedar trees shall fail, within the time specified by the Entomologist, to cut down and destroy such cedar trees, "it shall be the duty of the Entomologist himself to cause them to be cut down and destroyed."

Section 981 provides for an appeal by the cedar owner to the Circuit Court of the County, from the order of the Entomologist, and empowers the Court, upon such appeal to hear the objections and to "pass upon all questions involved, and determine the amount of damages, if any, which will be incurred by the owner in case such trees are destroyed." &c.

Considering these several provisions together, it becomes clearly apparent that notwithstanding the broad, general language of Section 885, that "it shall be unlawful for any person to own, plant, to keep alive and standing upon his * * * premises any red cedar tree or trees (which are or may be) the source, harbor, or host plant" of cedar rust * * * "and any such cedar trees when

growing within two miles of any apple orchard * * * are hereby declared a public nuisance and shall be destroyed, as hereinafter provided," yet because of the subsequent provisions of the statute, it can not be held that all trees such as fall within the just quoted description are denounced as nuisances, and subject to destruction.

[fol. 4] In the first place, the statute is not operative within any county or magisterial district by virtue merely of its enactment by the legislature. Section 893 expressly declares "the eight preceding sections" (all those dealing with cedar trees) "shall not be in force in any county or magisterial direct of any County, until the Board of Supervisors of that County shall by a recorded vote accept and adopt the same for the county or magisterial district in their county; and until such acceptance and adoption shall have been ratified and approved by the Circuit Court of such county"; or, in default of such adoption by the Supervisors, until its adoption by the Circuit Court on the application of a majority of the voters of such County or Magisterial District.

Secondly, even after such adoption for the County or any magisterial district, the statute itself requires, in district terms that its application in any particular locality, is conditioned upon:

1. A request from ten or more freeholders of the locality to the Entomologist;

2. An investigation of the locality by the Entomologist;

3. The ascertainment by him that there are, in such locality, cedar trees which are (or may be) the source, harbor or host plants of cedar rust, within two miles of an orchard, and constituting a menace to such orchard.

Re-arranging the order of the provisions of the statute, material to the point presently under discussion, and stating their substance and effect, what the statute provides is, that if ten or more freeholders of any county or magisterial district request the Entomologist to do so, the latter shall investigate the locality from which the complaint (request) is received, and thereupon, if he find that there are in such localities from which the request is received,

"cedar trees which constitute the source, harbor, or host plant of said disease," existing "within a radius of two miles of any apple orchard in said locality, and constituting a menace to the health of said apply orchard." he shall give notice to the owner of the cedar trees requiring the owner to destroy them if the owner has failed to do so.

Without having first received the freeholders' request, the Entomologist is wholly and absolutely without any power whatever either to require the destruction by the owner, or himself to destroy the trees. There is no provision for the destruction in any other mode, or as a result of any other procedure. The freeholders' request is the indispensible basis of any action by the Entomologist. Because no power is vested in the Court to order the destruc-[fol. 5] tion except in a proceeding by way of appeal from the order of the Entomologist, it obviously and of necessity follows that the initial requirement of the request from at least ten freeholders to the Entomologist is likewise an absolute sine qua non of such action by the court.

This Court, in Bowman v. Entomologist, supra, has itself declared that the cedar trees proscribed by the statute are not nuisances at common law. The statute is, therefore, one creating a right and providing the remedy, which remedy is, under familiar principles, annexed to the right and exclusive. It is to be remembered, too, that the statute is, in part, a criminal one, in that by Section 890, a punishment is provided for resistance of the Entomologist, for which reason the statute must be strictly construed.

So that it is patent that unless and until ten or more freeholders complain, no step whatever can be taken by any person looking to the destruction of the cedar trees.

It is further perfectly clear that if there be red cedar trees in a hundred different localities, all of which localities are within the boundaries of counties or districts for which, by action of the Supervisors or the voters, the statute has been adopted, all alike within the prescribed radius of an orchard, and constituting a menace thereto, and ten or more freeholders complain, the cedar trees in the one locality from which the complaint (or request) is received, are to be regarded as nuisances and destroyed, while as to the remaining ninety-nine localities, as to which there is no such complaint, they must be permitted to stand, whether

or not they be source, harbor, or host plants of the disease, within two miles of an orchard, and a menace thereto.

So that, in the last analysis, in a county (or district) for which the statute has been adopted by the Supervisors or voters, the power of the Entomologist and of the court to enforce it against the cedar trees in any particular locality, must still depend upon the will (whimsical, capricious, or otherwise), of the freeholders. If ten or more can be found who are willing to and do sign the request to the Entomologist, he is, under the statute, empowered and required to destroy the trees. If that number of freeholders cannot be found to so sign, the statute, though enacted by the legislature and adopted by the Supervisors or voters, must remain a dead letter.

In brief, the statute has not undertaken to require the destruction of all red cedar trees in a county or district in [fol. 6] which the law is applicable, which, being the source, harbor, or host plants of cedar rust, are within two miles of an orchard, and constitute a menace thereto, but to delegate to any ten or more freeholders, who may choose to exercise it, the privilege of determining in which localities, if any, where the cedar trees are all alike sources of infection, all alike within a two-mile radius, and all alike menaces to orchards, shall be destroyed and which shall be permitted to stand.

This is, in effect, an attempt to delegate the power of legislation to the proletariat, or, more accurately, to an insignificant portion of the proletariat, and contracts strikingly with the instances in which it has been held that the legislature may validly leave it to the discretion of some legally constituted local body to determine whether a statute shall be operative within the area for which such body may act.

The final result of these provisions is, that though enacted by the Legislature and adopted by the Board of Supervisors or voters of a particular county, the statute, by its own terms, is not and cannot become operative as to any particular locality, or as against any particular cedar trees, unless and until it has, in addition, been adopted for that locality, by ten or more freeholders of the locality, who are self-selected and as to whom it is not required that they shall possess any qualification beyond that of being freeholders.

This is not government! It is tyranny, and, tyranny in that worst of all forms in which a man's property rights, and even the question of whether any particular conduct on his part shall be criminal, are to be determined, not by legislators or by any other body regularly designated, by an orderly method, to act in the premises, but by an utterly irresponsible few, and they not even invested with anything savoring of official (much less legislative) authority.

Only in the history of Rome, so far as petitioners are advised, may an analogous tyranny be found. It is a curious coincidence that it is in the poetic version of the story of another Virginia, that we are told that

"Of all the wicked Ten, still are the names accursed!"

Well may all patriotic Virginians of the twentieth century shudder at the attempt of the statute under consideration to entrust their rights to a like number of uncontrolled freeholders; and well may their courts heed and, in the [fol. 7] present instance, act upon that watch cry of freemen—obsta principii.

It is submitted that the statute, because of the failure just discussed, is inimical to that clause of the Fourteenth Amendment of the Constitution*al* of the United States, providing that "no state shall make or enforce any laws which shall deny to any person within its jurisidiction the equal protection of the laws."

The Supreme Court of the United States, whose decisions upon such questions, is binding upon this Court, in Eubank v. Richmond, 226 U. S. 137, 57 L. Ed. 156, has absolutely condemned, as obnoxious to the constitutional provision just invoked, a statute (and an ordinance enacted under its authority) which, it is submitted, can not be distinguished in principle from the statute here involved.

The ordinance (authorized by the statute) whose validity was considered in the case cited, provided that upon the request of the owners of two-thirds of a block, the street committee of the city council should establish a building line for such block, not less than five or more than thirty feet from the street line. No discretion was, by the ordinance, or by the statute vested in the street committee, except to determine where, within said five to thirty feet the

building line should fall. This Court having upheld the ordinance, its decision was reversed by the Supreme Court on the ground that the ordinance was obnoxious to the equal protection clause of said Fourteenth Amendment, in that the ordinance was to become operative as to any particular block, or not, according to whether or not the owners of two-thirds of the particular block so requested; and that it was thereby left to such owners, not to any legislative or other properly constituted body, to control the manner of use of his land by another owner in the same block, which says the Court, "is the vice of the ordinance."

In the case at bar, it is to be noted, the statute does not absolutely empower the Entomologist to destroy the cedar trees, even when infected with cedar rust, and when within two miles of an orchard and a menace thereto; it vests in him no discretion as to the destruction of such of said trees as may be the subject of the freeholders' complaint, beyond the mere preliminary determination of the facts that they are (or may be) source, harbor, or host plants of the disease, and that they are a menace to an orchard within the said two-mile radius. If those facts exist, then, upon receipt of the freeholders' request, it becomes the imperative duty of the Entomologist to require, and in case of dis-[fol. 8] obedience of his order, to cause, the destruction of the cedar trees.

The omnipotent deus ex machina, who makes the law operative, is (not the legislature, not the Supervisors, not any regularly and legally constituted body, but) the irresponsible ten freeholders.

The parallel between the Eubank case and that at bar is so glaringly apparent that it would seem superflous to further point it out, The principle upon which the statute and ordinance in the Eubank case were held invalid clearly requires the same holding as to the statute involved in the case at bar.

See Commonwealth v. Coal Co. (Ky.)., 237 S. W. 1086.

A Kentucky act required owners or operators of coal mines, or any other like business, working thirty persons or more, within six months after 30 per cent. or more of their employes decided by vote to ask and notified the employer, to erect a wash house adjacent to such mine. The Kentucky court stated that the requirements of erecting such a wash house were within the police power of the

State, and that the act would be constitutional if it were not that the obligations of the act were made dependent upon the vote of the employees, the Kentucky constitution providing that no law except such as pertains to certain matters of which that was not one, shall be enacted to take effect upon the approval of any other authority than the General Assembly, unless otherwise provided in the constitution. The court further stated that it is a general rule that the legislature can not delegate its power of legislation, and that this law came within the inhibition of the above section of the Kentucky constitution.

See also State v. Crawford (Kan.), 177 Pac. 360.

Kansas statute required all electric wiring to be in accordance with a code prescribed by fire underwriters in the State. Information was quashed and the State appealed. The court affirmed the lower court, stating that,

"In our commonwealth the power to make laws is vested in the legislature. That body may not abdicate nor delegate its powers to any other body, however learned, wide, and far-sighted the latter may be * * *"

And Fortune vs. Braswell (Ga.), 77 S. E. 818.

Georgia passed a statute requiring certain formalities to be complied with when a crop contract was entered into, [fol. 9] and provided penalties, and provided further that any person violating the statute should, at the option of the party alleged to have been injured, be prosecuted, and upon conviction be punished as for a misdemeanor. The court held this to be a violation of the Georgia constitution, as depriving a person of life, liberty, or property, without due process of law, the court stating that a law which gives to an interested party the absolute right to declare an act to be a public offense, punishable by imprisonment, or a private wrong redressable by arbitrary damages, is certainly lacking in due process, and that while the legislature may denounce an act to be a crime, it can not delegate to a private individual the power to classify such an act as a public or private wrong at his option.

That the option, in the case at bar, is that of ten individuals, instead of one, as in the cited case, does not render the state less obnoxious.

And, Noel v. People (Ill.) 58 N. E. 616, 52 L. R. A. 287.

An Illinois act conferred upon the boards of pharmacy power, in their discretion, to issue permits, the board being vested with practically absolute discretion. The Court stated that the board was thus authorized to confer a privilege upon one person and to deny the same privilege to any other, and is not required to be governed in doing so by any fixed rules or regulations, but may be moved only by its own caprice or favoritism. Laws thus conferring discretionary and arbitrary powers upon statutory officials are not only invalid, but amount in effect to a delegation by the legislature of its legislative functions to the board or officials in question. It was held that the act was not within the police power of the State and void for the above reason.

And, Ry. Co. v. Todd (Ky.) 11 L. R. A. 985, 5 S. W. 56.

A Kentucky statute gave a right to adjoining land owners to require a railway company to build a fence on each side of a right of way at its own cost. Held to be a delegation of the legislative powers and unconstitutional, the adjoining land holder having the discretion to determine for himself the necessity of the fencing.

In Bowman v. Entomologist, supra, this Court held the Cedar Rust statute constitutional as against the objections urged against that case, but as the report of the decision shows, its invalidity because of the considerations just discussed was not amongst the matters to which the Court's attention was directed, nor is the Eubank case or any of these just cited referred to in this connection, in that opinion.

A further consideration not presented in the Bowman [fol. 10] case which petitioners deem of great importance, is that the statute here considered is void for vagueness and indefiniteness.

Says the statute (Section 886):

"In any county in this State where the above mentioned disease exists, it shall be the duty of the State Entomologist * * * upon the request in writing of ten or more freeholders of any county or magisterial district"—not of that in which the disease exists nor of a county or district for which the statute has been adopted—"to make a

preliminary examination of the locality from which said request is received," and destroy such infected cedar tree as such investigation may disclose, existing in such locality, and within a radius of two miles of an apple orchard, in such locality.

It will be noted that neither here nor elsewhere in the statute is there any definition of what is meant by the term "freeholders of any county or magisterial district." Does it intend persons who, being resident within any county or magisterial district, in the same locality in which the disease exists, own real estate in the same county or magisterial district? Or is it meant that such residents of any county and of such locality, who owns real estate anywhere—within or without the state—may become signatory to the request? May one, who not being a resident of the county or district where the disease exists, nor of that locality, nevertheless owns real estate there situate, be such signer? Does the statute permit such request to emanate from ten persons, all of whom reside without the state, but own real estate within the locality, referred to? Or is it permissible for ten persons residing within such locality and owning real estate not located in Virginia, to make such demand? To these questions, the statute makes no reply. It contains no criterion whatever by which to determine who are the freeholders of the locality to whom is confided the power of invoking the axe of the Entomologist.

Again, what is the "locality" intended by the statute? No technical meaning attaches to the term. That it is not synonymous with "County" or "Magisterial District" is at once apparent when it is considered that the several terms are employed in the very same section of the statute, and must, for that reason, under familiar rules of construction, be taken to intend different meanings. In common usage the word "locality" is extremely elastic in its meaning, and may refer to any of a vast variety of areas, from the most restricted to a far-stretching territory. For instance, the "locality" of a spring of water in the moun- [fol. 11] tains would usually intend but a small area surrounding the spring. If one in Staunton should speak of the "locality" of Richmond, one may desire to be under-

stood as referring to the territory in the neighborhood of Richmond extending as far as Petersburg, while, if a speaker be in Europe he may, by the "locality" of Virginia mean that State and its neighboring states. So that when the statute provides that the freeholders are to be of the locality which they ask shall be investigated, and in which offending cedar trees are to be destroyed, it affords no criterion by which the Entomologist or the Court may determine whether the signers of the request are eligible as such.

Suppose that in a county for which the statute has not been adopted there exists an orchard; that in an adjoining county for which it has been adopted, and in the same "locality"—whatever that may mean—there are valuable cedar trees; is it open to ten freeholders of the non-adapting county to request—in effect, to require—the destruction of the cedar trees? Whether so or not, if, the orchard being situated as above supposed, is surrounded, on all sides, by an enormous growth of cedar trees, growing like itself in the non-adopting county, and some small part of the growth of cedar trees, extends over into the adopting county—can the cedar trees in the latter be destroyed on application of the freeholders of either county, while those in the non-adopting county must remain untouched?

It is further most respectfully submitted that the statute is void because repugnant to the two provisions of the Fourteenth Amendment of the Federal Constitution that "No State" shall (1) deprive any person of life, liberty, or property, nor (2) deny to any person within its jurisdiction the equal protection of the laws," for other reasons now to be stated.

At the trial (Mss. Record, pp. —) petitioners offered to prove that the destruction of the cedar trees involved in the proceeding would result in a diminution in the value of the tract of land on which they stand of from Five Thousand to Seven Thousand Dollars. While this evidence was rejected by the trial Court (improperly as petitioners submit), the fact that it was so offered is sufficient to justify the assumption of such value as a fact, in the argument now to follow. In Bowman v. Entomologist, supra, there was no proof in the record and none offered that the cedar

trees there involved were of appreciable value as standing trees, and none that any diminution in the value of the land would follow their destruction. In fact, in the opinion in [fol. 12] that case (pp. 370-1) it is distinctly stated (presumably, of course, on the basis either of the uncontroverted evidence in that record, or of the trial court's finding of the facts established by what it regarded as the preponderance of conflicting evidence) "that they" (cedar trees) "are valuable only where they have attained a sufficient size to make fence posts or fuel * * * Under the statute, all of the parts of the trees available for fuel or fence posts are left undestroyed and remain the property of the owner. That the cedar balls which form or grow on such trees of all sizes are the parts which become infected with said disease and are the source from which apple trees are in turn infected therewith. That such are the only parts which are destroyed under the statute, and they have little or no value for any purpose. Certainly, as compared with the value of the apple trees, to which their existence is a serious menace, their value is de minimis." From this excerpt it plainly appears that in the Bowman case it was not shown that a serious diminution in the value of the land would result from the destruction of the cedar trees. Here, the offer was to show such diminution to the extent of from Five Thousand to Seven Thousand Dollars. For disregarding as de minimis, a value so great, there is absolutely no warrant in the law. The effort of the Entomologist in the case at bar, is, in accordance with the statute, to destroy actual, valuable property of petitioners in order to the enhancement of the value of the property of neighboring orchard owners.

The question is, therefore, presented by this record, whether one special of valuable property can be constitutionally declared a nuisance and destroyed, in order to increase the value of another species of privately owned property, or to promote the financial interests of the owners of the latter class of property.

The case at bar, as petitioners submit, is not controlled by the decision in the Bowman case, because of the difference in the facts just pointed out.

Nor, in view of this same difference in the facts, can it be said that this case is analogous to those cited by this

Court in support of its decision in the Bowman case, in which statutes have been held valid which provided for the destruction, as nuisances, of noxious weeds (never of any value for any purpose) likely to become detrimental to agriculture; or of fruit trees infested with San Jose scale; or of peach trees affected by "the yellows," or of apple trees infected with fruit scab, or of oranges affected by [fol. 13] "citrus canker"—in all of which instances, the disease was one so affecting the tres to be destroyed as that their value as property was utterly annihilated, and whose destruction, therefore, in order to preserve healthy trees of like kind, could, in no proper sense, be regarded as a taking of property. Such trees, so diseased, become, of course, from the standpoint of value, of the same class as noxious weeds, and within the de minimis doctrine.

But in the case at bar, the cedar trees are not themselves injured in the slightest degree as a result of their becoming hosts of the cedar rust. Nor is their contribution to the market value of the land on which they grow at all diminished thereby. They are valuable property before the cedar rust becomes their guest—they remain just as valuable afterward.

To petitioners it seems a wholly untenable view that of two species of valuable property, one may be selected for destruction in order to the preservation of another from the effects of a disease for whose existence and continuance they are interchangeably responsible. That such is the mutual responsibility of the cedar trees and the apple trees, appears from the testimony of the Entomologist and his assistant, Mr. Willey, in this record. In effect, their testimony is that the apple tree (with the aid of the cedar, which itself is not injured) commits suicide.

The statute contains no requirement and it does not appear in this record, that the orchard to be protected shall have ante-dated the presence of the cedars. It is thus entirely possible, if the statute as construed by the trial Court, be valid, that one man may elect to plant a sufficient number of apple trees of an infectible variety, to warrant the claim that it is an orchard, but really not of sufficient size or value to be properly regarded as an appreciable contribution to the orchard industry—in fact, so far as anything in the statute is concerned it need not be either pres-

ently or potentially a means of profit—within two miles of an existing valuable growth of cedars, whose presence adds many thousands of dollars to the tract on which it stands, and thereupon, upon the appearance of cedar rust originating in either the apples or the cedars, invoke (with the concurrence of nine other freeholders, who are not even required to have any sort of interest in the matter) the destructive power of the Entomologist, thereby inflicting an enormous loss on the cedar owner with no compensating gain, even to the supposed orchardist, and none to the community at large. It is to be observed that the record in the case at bar wholly fails to disclose that the "orchards" [fol. 14] within a two-mile radius of petitioners' cedar trees, are of any considerable value, or that the result of destroying petitioners' property, as proposed, will result in rendering them so.

There is, therefore, no basis for a conclusion that upon a comparison of values, the more valuable property will be preserved by the enforcement of the order of the trial Court. Even if there were, petitioners are profoundly of the opinion that there is not, in the American theory of government, any room for the view that one man's property may be taken or destroyed either directly by eminent domain, or indirectly, under the guise of taxation, or the exercise of the police power, in order to enhance the property values or the financial prosperity of another. Such a taking or destruction can only be accomplished, it is submitted, by an unwarrantable disregard of the provisions of the Fourteenth Amendment above quoted, and in violation of the principle declared by the Supreme Court to be inherent in the fabric of government likewise forbidding it. Certain it is that the statute prescribes no means whereby the relative proportions or values of the growth of cedars to be destroyed, in a particular case, and of the growth of apple trees sought to be preserved thereby, may be measured. It is not even required that the Entomologist or the Court shall be of the opinion that the orchard for whose benefit the destruction of the cedar owner's property is required, are as compared with the cedars, of any considerable value; that they shall be sufficient in extent or value to be deemed commercially important; or that in any way, they shall be shown capable of any material contribution to the general welfare of the community or of the state, even indirectly,

by adding to the value of its industries or contributing to its aggregate wealth.

It is only by a most strained and wholly unwarranted construction of the term "general welfare," that in any aspect, it can be said that the statute is designed to, or will, promote the "general welfare" by its enforcement in a case like that here presented. If it be assumed that the orchard industry of the section at large from which the case comes is one of considerable profit—and the record does not so show—that profit redounds to the benefit, not of the state or of any of its political subdivisions, nor of any public activity, but of the private owners of the orchards. If it be said that their prosperity is part of the general welfare, the same is true of every profit gaining enterprise in which citizens engage; and if the "police power" extends to the promotion, by means of the taking or destruction of privately owned, valuable property, of the welfare of the [fol. 15] owners of orchards, it would seem clear that any of the other industrial or profit-gaining industries in which citizens may engage, may be likewise promoted. Upon such a view, the property destroying capacity of the "police power" would be absolutely limitless, and the constitutional protection of property rights but hollow mockery.

The view here presented finds ample support in Kankana &c Co. v. Green Bay &c Co., 142, U. S. 273, 35 L. Ed. 1010, and in other decisions of the same Court. In the Kankana case it is said:

"It is probably time that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power plant to be leased for manufacturing purposes. This would be a case of taking one man's property for the benefit of another, which is not a constitutional exercise of the power of eminent domain."

Surely the "general welfare" or the "general prosperity" if those terms be construable as meaning or including the financial well-being of the community resulting from the aggregation of the individual wealth of its citizens, is as truly promoted by the increase of manufactures as by the increase of orchards. It is also true that manufacturers of an infinite variety are just as useful and even indispensable in the production of a food supply, as is the production

of apples. So that if the power exists to take or destroy private property for the one purpose, the same reason would justify it for the other, whether in the exercise of eminent domain or of the police power. When the product of the manufactures is for home consumption, it is patent that it may be much more truly said of it that it is promotive of the "general welfare" or the general prosperity of the people of Virginia, than of the produce of orchards "practically all of which is marketed outside of the State, and at least fifty per cent. thereof in foreign countries," as was testified in the case at bar, by the Entomologist's witness, Mr. Massey. It would seem superfluous to argue the proposition that in so far as the police power of Virginia may be exercised for the promotion of a food supply, it is confined to measures having an appreciable effect on the supply of food for the people of Virginia. With the food supply of the people of other states or foreign countries the police [fol. 16] power of Virginia has obviously, no concern. The police power of Virginia is a power exercisable within, and for the benefit of the people of Virginia. It is a wholly unwarrantable extension of that power to require, under its guise, the destruction of valuable property, located within the state, owned by citizens of the state, and entitled to the protection of the laws of the state and the Federal Constitution, in order that the people of other states and of foreign countries may be provided for. Such an extreme of altruistic philanthropy can not be permitted to the legislature nor enforced by the courts, however much the judges in their private capacities may desire to see the world at large amply provided with fruit.

In line with the holding in the Kankana case, above cited, it is said, in 12 Corp. Juris, 7252, upon the authority of decisions there cited:

"The taking of the private property of one person without the owner's consent, for the private use of another, even though it be accomplished under the guise of taxation or of the right of eminent domain is a violation of the guarantee of due process of law."

That the "police power" doctrine is not one under which the very fundamentals of the Constitution may be undermined, and that its limits are to be found in the Constitu-

tion itself, very clearly appears, not only from the decision in Eubank v. Richmond, supra, but in numerous other utterances of the Supreme Court.

In Lochner v. New York, 198 U. S. 45, 49, L. Ed. 937, for instance, it is said:

"It must of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise, the Fourteenth Amendment would have no efficacy, and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the health of the people. Such legislation would be valid no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere [fol. 17] pretext—become another delusive name for the supreme sovereignty of the state to be exercised, free from constitutional restraints."

And in Dobbins v. Los Angeles, 195 U. S. 233, 49 L. Ed. 169, it is said:

"It is now thoroughly well settled by the decision of this court that * * * legislative enactments undertaking to regulate useful business enterprises are subject to investigation in the courts with a view to the determining whether the law * * * is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on business, to make contracts, or to use and enjoy prosperity." * * *

Penn. Coal Co., v. Mahon, 260 U. S. 393, 67 L. Ed. 322, involved the validity of a statute which prohibited the mining of coal, so as to cause the caving in, collapse, or subsidence of public buildings, streets, roads, dwellings, and other structures. It was sought to uphold the statute on the ground that it was a valid exercise of the police power designed to promote the safety of citizens. The Supreme Court reversing the Court of Appeals of Pennsylvania, held that as applied to lands under the City of Scranton, which had been conveyed to surface owners with the reservation of the right to mine the underlying coal, the law was void, because not a valid exercise of the police power,

despite the legsslative finding that it was necessary to protect the lives and safety of the citizens of the state. In his opinion in that case, Mr. Justice Holmes said:

"When this seemingly absolute protection" (of property, by the Fourteenth Amendment) "is found to be qualified by the police power the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way, under the Constitution of the United States. The general rule is at least that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking, * * * In general, it is not plain that a man's misfortunes or necessi- [fol. 18] ties will justify his shifting the damage to his neighbors' shoulders. We are in danger of forgetting that a strong desire to improve the public condition is not enough to warrant achieving the desire by a shorter route than the constitutional way of paying for the change."

But if, notwithstanding the foregoing argument, the Court should be of opinion that the statute is valid, it is further submitted that in the instant case, it has been misconstrued and misapplied by the learned trial court.

The uncontroverted evidence shows that a certain roadway leading from the Valley Turnpike, to the dwelling house of petitioners, on the tract aforesaid, is bordered, on each side there, by a line of cedar trees, about two hundred in all, of which a part only were examined by the Entomologist and found to constitute source, harbor, or host plants of cedar rust. The evidence at the hearing was to the same effect. The trees so affected do not exceed fifty in number. On the tract, besides the very ornamental trees bordering said roadway, are two large groves of cedars, and numerous other cedar trees scattered over the tract at various points. Of said groves and scattered trees, the evidence fails to show that more than a very few were found by the Entomologist or proven at the hearing, to be such source, harbor, or host plants.

The Entomologist by his notice, however, demanded, and the Court by its order required, that all of the red cedar trees on the tract should be cut down and destroyed. This included not only the very few trees shown to be affected

by cedar rust, but those—by far the greater number—which are entirely free from it.

If the statute be construable as requiring the destruction of these absolutely healthy trees—valuable property of petitioners—it is manifestly unconstitutional in so far as such requirement is concerned, and by no considerable stretch of imagination can it be defended as an exercise of "police power."

But petitioners are of the opinion that the statute is not so construable.

By Section 885, "any red cedar tree or trees (which are or may be) the source, harbor, or host plant for cedar rust," when growing within a radius of two miles of any apple orchard," are declared a public nuisance, and liable to be destroyed.

By Section 886, it is provided that the Entomologist shall [fol. 19] require, and himself cause the destruction (if the owner fails to obey his order), of "any cedar tree or trees" in the locality inspected by him, as therein provided, "which constitute the source, harbor, or host plant of said disease," &c.

Nothing in the language thus used, or appearing elsewhere in the statute, justified in any degree the conclusion that any cedar tree not presently a host, harbor, or source plant of cedar rust may be destroyed. The phraseology "which are or may be," such harbor, host, or source plants, of necessity imports that the trees shall be such at the time of the inspecting, or, at the very least that they **"may"** then "be" so affected. If the legislature had intended that all red cedar trees, within two miles of an orchard, which, because they are cedar trees, may hereafter become, such source, harbor, or host plant, should be destroyed, nothing could have been easier or simpler than to have plainly said so. If that had been the intention, all that the statute in its first section need have said would have been, "in any county or magisterial district for which this act may be adopted as hereinafter provided, which are within a radius of two miles of any apple orchard containing varieties of apples infestible by cedar rust, are declared a public nuisance, and shall be destroyed as hereinafter provided."

And in Section 886, much use of words could readily have been avoided by a simple provision that the Entomologist,

upon ascertaining the existence at any place, of cedar trees declared by the preceeding section to be a public nuisance, should require the owner to destroy them, and in the event of the owner's failure to do so, himself cause their destruction.

The very elaborateness of the provisions of the two sections just referred to is highly indicative of an intention on the part of the legislature to require only the destruction of such of the cedar trees within two miles of an orchard as, being presently infected constitute a menace to the orchard.

The construction contended for by petitioners is strengthened by a consideration of Section 887 providing, that if in the judgment of the Entomologist "it is practical to treat such cedar tree or trees * * * which have been as aforesaid declared to constitute a menace to any apple orchard, in such a way as to render it or them harmless, he may direct such treatment." From which it is patent that it is only such trees—those which are or may presently be sources or harbors of infection that the statute intends shall be treated, or destroyed.

[fol. 20] It appears that only cedar trees bearing cedar balls are source, harbor, or host plants of cedar rust, but because the spores, whose discharge from the balls result in communicating the disease to the apples, may as to any particular ball be exhausted in one season, while the ball may continue on the cedar for many, it is difficult for the Entomologist to determine which of said ball bearing cedars is at any particular time, the source harbor or host plant. Any such ball bearing cedar may be such plant. No other cedar may be. It is to meet this condition that the alternative expression "are or may be source, harbor or host plants" is employed in the statute.

There is, it seems clear, no justification whatever, in the statute of a construction which reads into it a denunciation of all cedar trees, alike, which stand within two miles of an orchard, some of which are or may be source, harbor or host plants and others neither are nor may be such source, harbor or host plants.

It is to be observed, too, in this connection, that in Section 886, which provides the sole procedure for the destruction of any cedar trees, it is said that the Entomolo-

gist, on request, shall investigate the locality from which it is received, to ascertain if any cedar tree or trees * * * are the source of, harbor or constitute the host plant for the said disease." * * * and that said cedar trees exist within a radius of two miles of any apple orchard, * * * If * * * it shall appear there are cedar trees which constitute the source, harbor or host plant of said disease."

By phraseology—all couched in terms indicative of the present tense—it can only be intended that trees which are already affected and not those which are liable to become affected in the future, are to be destroyed.

The foregoing argument has dealt with the statute as it now appears, in the Code of 1919. In point of fact however, the original Act on the subject, was approved March 4, 1914. This original Act provided in its first Section, corresponding to Section 885 of the Code, that any red cedar trees which are or may be the source, harbor or host plants of cedar rust, when growing within one mile of any apple orchard "are declared a public nuisance and shall be destroyed as hereinafter provided."

The 9th Section of the Act (corresponding to and identical in its substantial part with Section 893 of the Code), [fol. 21] provided that the Act should not be in force in any county or magisterial district in any county, until the board of supervisors thereof shall by a recorded vote accept and adopt the same for their county or magisterial district of their county; "and until such adoption should be ratified by the Circuit Court of such county, or in default of such action by the supervisors, a majority of the qualified voters of any county or magisterial district might by petition to the Circuit Court, request its adoption, whereupon such court should declare the Act adopted for such county or magisterial district.

The Act was, on June 14, 1920, adopted by the Board of Supervisors of Shenandoah County, for Lee Magisterial District in which district petitioners' land lies, and such adoption was ratified by the Court.

By an Act approved March, 1920, which, however, did not go into force until the 18th day of June, 1920, the first section of the Act was amended so as to increase the prohibited radius from one to two miles.

In this situation, the Act which the Board of Supervisors adopted, was of necessity, the original Act, containing the

one mile limit. That was the only Act in force at the time of the adoption, and none other could then have been adopted.

The Act as amended, increasing the prohibited radius to two miles, has never been adopted for Shenandoah County or for Lee Magisterial District.

The amendatory Act, which went into operation long anterior to the notice of the Entomologist requiring the destruction of petitioners' cedars, had the effect, as petitioners submit, of repealing the previous act, adopted for Lee District, as a result whereof the antecedent adoption of the Act for that District was annuled, from the date at which the law, as amended, because operative.

In this connection, the Court is again reminded that in Bowman v. Entomologist, supra, it has already been declared that at common law, cedar trees, even of the kind, and in the situation denounced by the statute, were not a nuisance. It is plain, on their faces, that the legislature never intended either the original Act, or the amendatory statute, to be operative in any county (or district) unless the same should first receive the approval, for that territory, of the Board of Supervisors of the County, or the majority of the voters of that county or district. By its own terms, the act, quod such territory, is conditioned [fol. 22] upon such adoption. It is not imposed upon the people of any political subdivision by the mere will of the legislature (as it might have been) but is to become there operative only with the consent of such people or of their representatives, the Supervisors.

There is nothing in the amendatory Act of 1920, changing the prohibited radius from one to two miles, and making no other change whatever in the original Act—even suggesting that the new law, should any more than the old one had, become operative in the absence of the local approval upon which it was conditioned in the original Act. In brief, the amendment did not, and did not purport to be complete in itself. It purported to amend one section of the pre-existing Act, and by an absolutely necessary implication left all of the following sections thereof unaltered and in full force. Amongst the sections so remaining in unabated force was that which required that before becoming operative the Act must be adopted, as to any particular county (or district) by the Supervisors, or in

the alternative, by the voters. The amendment,—extending the radius—was not only of a material nature; it was in the very basic portion of the Act. It wrought a fundamental change therein. It brought within the operation of the law, as amended, cedar trees in the territory not heretofore subject to the prohibition, namely, within the radius extended from one mile to two miles of an orchard. The same reasons which led the legislature to submit the Act to local option, in its original form, would, of course, operate to cause its like submission as to the amendment, enlarging its scope. But whatever the reason, the legislature did so submit it, because it neither expressly declared its intention that the amendatory Act should become operative of its own force (without the consent of anybody) nor repealed, said clause 9, (now Section 893), providing for such submission, and conditioning the operation of the statute upon its local acceptance. The legislature had the power either to make such declaration, or to repeal the provision. It did neither, and the courts must assume that its failure to do either was intentional and with full knowledge that the amendment was subject to local acceptance.

It is also to be borne in mind that it is entirely possible that the Board of Supervisors of Shenandoah County, which adopted the law containing the one mile limit might have been wholly unwilling and have refused to adopt one with a two-mile limit.

[fol. 23] A view of this matter, different from that of petitioners would be productive of an anomaly which it is difficult to conceive the legislature ever intended to bring about. Suppose that one of two adjoining counties in which the condition as to apples and cedars were substantially identical, had adopted the original one-mile limit Act, but not the amendment, and that the other county had never adopted either. Will this court say that in the first county the two miles prohibition applies, regardless of the will of that county, while it remains open to the second to accept or reject it as it may choose?

In the construction of the two Acts above discussed, there are certain cardinal rules to be applied:

(1) A statute speaks from the time of its adoption;

(2) But this rule applies likewise to an amendatory act affecting only one section of a previously adopted statute.

(3) The amendatory act never operates retroactively, but is engrafted into the original act, and becomes a part thereof—the amendment speaking only from the time of its adoption, not interrupting or preventing the continued operation of the residue of the act so altered by the amendment.

Endlich on Interpretation of Statutes, Section 196, says:

"No doubt a statute which is amended is thereafter and as to all acts subsequently done to be construed as if the amendments had always been there, and the amendments itself so thoroughly becomes a part of the original statute that it must be construed in view of the original statute as it stands, after the amendments are introduced and the matters superseded by the amendments eliminated * * * and even an amendment of an act 'so as to read' in a prescribed way has no retroactive force but is to be understood as enacted when the amendment takes effect."

Sutherland on Statutory Construction, Vol. 1, p. 443, states the rule to the same effect:

"This change takes effect prospectively according to the general rule. But all the provisions of the prior law amended which continue in force after the passage of the [fol. 24] amendatory act derives their force thereafter not from the original but the amendatory act, and as to the future the old act or section is repealed in toto."

And in speaking of an amendatory act and its relation to original act the same author says:

"So far as the section is changed, it must receive a now operation, but so far as it is not changed, it would be dangerous to hold that the mere nominal re-enactment should have the effect of disturbing the whole body of statutes in pari materia which had been passed since the first enactment. * * * The effect of an amendment of a section of the law is not to sever it from its relation to the other sections of the law but to give it operation in its new form as if it had been so drawn originally, treating

the whole act as a harmonious entirety with its several sections and parts mutually acting upon *upon* each other."

These principles of statutory construction are clearly stated in 25 R. C. L., Sec. 159:

"When a statute continues a former statute law, that law common to both acts dates from its first adoption, and only such provisions of the old act as are left out of the new one are gone, *and only new provisions are new laws.* Where an act is amended 'so as to read as follows,' the part of the original act which remains unchanged is considered as having continued in force as the law from the time of its original enactment, and the new portion as having become the law *only at the time of the amendment.*"

In speaking of amendments to an existing law, Black on Interpretation of Laws, p. 360, says:

"In the second place, those provisions which are newly added by the amendatory statute are not to be considered [fol. 25] as having been in force from the beginning. They take effect from the time of the enactment of the amendatory act and derive their whole efficacy and vitality from the amending law and not from that amended. In other words, such new provisions will not have any retrospective effect unless it is explicity so declared."

These principles were applied by the Supreme Court of the United States in Murray v. Gibson, 14 L. Ed. 755. In constructing a statute of the State of Mississippi and an amendment thereto relative to limitations of actions, that Court said:

"As a general rule for the interpretation of statutes it may be laid down that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only. Especially should this rule of interpretation prevail where the effect and operation of a law are designed, apart from the intrinsic merits of the rights of parties, to restrict the assertain of these rights."

The Murray case was applied by the same Court to an act of Congress amending only one section of a previous act.

In Chew Hoong v. U. S., 28 L. Ed. 770, the fourth section of an act of Congress of 1880 was amended in 1884, the amendment prescribing the certificate which should be produced by a Chinese laborer as the only evidence permissible to re-enter the United States. The Supreme Court held that the amendment was not applicable to a laborer who resided in this country, departed before the amendment, but remained away until after the same became operative, although the whole act as amended would operate from the date of the amendment. It will be noted that the amendment to this Chinese Exclusion Act, consisting of many sections, related only to one section. That Court said:

"Words in a statute ought not to have a retroactive op- [fol. 26] eration unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature can not be otherwise satisfied, and such is the settled doctrine of this court."

To the same effect see Dodge v. Nevada National Bank, 109 Fed. 731, C. C. A. 9th.

Where a section of a statute is amended and the amendment is in such terms as to take the place of such section, the statute in which the original section stood, as to future acts is to be regarded as if the amended section is incorporated therein. This rule is of such universal application that if by an act subsequent to the amendatory act the section of the original statute be repealed, the amendment which stood in its stead is also thereby repealed, and this is so although the amendment declares that section to be amended 'so as to read as follows':

Kamerick v. Castleman, 21, Mo. App. 587;
Goodno v. City Oshkosh, 31 Wis. 127;
Kelsey v. Kendall, 48 Vt. 23.

The Supreme Court of Michigan has well expressed this as follows:

"The legislature, by the act of 1869, made a change in Section 24 of the chapter, but made no other alteration, and the whole chapter in its present form is now to be read as one act, with the several parts and clauses acting on each other as their sense requires."

Conrad v. Nall, 24 Mich. 275.

In construing a statute and an amendment thereto, the Court in Parrell v. State, 24 Atl. 725 (N. J.) laid down certain rules of construction which have been applied and cited by many subsequent cases. In that case the court said:

" 'It is an established rule of law that all acts in pari materia are to be taken together, as if they one law.' Potter Dwar. St. p. 189. All consistent statutes, which can stand together, though enacted at different dates, relating [fol. 27] to the same subject, and hence briefly called statutes in pari materia, are treated prospectively, and construed together, as though they constituted one act. Suth. St. Const. Sec. 283. As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does as amended. People v. Circuit Judge, 37 Mich. 287. In Conrad v. Nall, 24 Mich, 275, a section in a chapter of the Code was amended, and it was held that it was not intended to operate independently of the other provisions of the chapter, but that the whole chapter in its present form must be read as one act. The rule is correctly stated in Ind. Interp. St. Sec. 294, as follows: 'A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there; and the amendment itself so thoroughly becomes a part of the original statute that it must be construed in view of the original statute as it stands after the amendments are introduced and the matters superseded by the amendments eliminated'."

The Farrell case was cited and the principles enunciated by it applied by the United States Supreme Court in Blair v. Chicago, 50 L. Ed. 801. In that case an amendatory act applied to one section of a general statute containing

many sections. The amendatory section extended the corporate life given to certain city railway corporations. The City of Chicago claimed that the amendatory act did not apply to the litigant city railway, that it was a trespasser on its streets. The question involved was whether or not the other provisions of the Act continued in force and effect and were applicable to the corporate existence and licenses. The Court in the Blair case, at page 832, said:

"While nothing was specifically said about the North Chicago City Railway Company in this connection, the tenth section of the act after this amendment we think should be read in connection with the amended act, so that the act of 1859 is to be read as if it had originally been in the amended form. In this view, the extended life of the corporations created by the first section must be read into the charter of the North Chicago City Railway Company, created by the tenth section."

[fol. 28] That Court cited with approved the Farrell case and the quotation from Endlich on the Interpretation of Statutes as previously quoted herein.

Applying the foregoing principles to the case at bar, we find that the amendment of 1920, which added an additional mile to the prohibited radium, became incorporated in the Act of 1914, and that, in so far as the amendment applies to and changes the pre-existing section, it must be construed and interpreted in connection with all of the other provisions of the original Act of 1914, and is subject to and dependent upon Section 9 of that Act. Before the amendatory Act can become operative, it must be adopted by (a) the Board of Supervisors of the County, or, in the event of their failure to act, (b) the petition of a majority of the voters of the county or district.

Where the legislative body has made the operation of its act contingent upon the vote of the people, the act can not be enforced without the happening of the condition, and this principle applies not only to the original Act, but to the original Act as amended where the character of the amendment requires submission and the section of the original Act providing for such vote is retained or not mentioned in the amandatory Act.

This identical question was squarely decided in a recent case in 1922, by the Court of Appeals of Texas, ex parte Jank, 245 S. W. 685.

Jank was prosecuted on what was known as the "tick eradication" law of the State for failure to dip his cattle. The facts in the case were these: In 1917 the Legislature passed the tick eradication law. Several counties (including Lee County) were described as situated in Zone 3. The Act provided that it was to become effective in all counties on January 1, 1922, but the act also provided that any of those counties might hold an election and by popular vote put the law into effect in that county any time before 1922. In 1919 Lee County, by popular vote, adopted the law. The law was amended in 1920 in some material matters, but the amendment was never referred to the popular vote of Lee County for approval. The complaint against Jank was filed in October, 1921, in Lee County. The Court of Appeals held that he could not be prosecuted under the amended Act of 1920, for the reason that the amended Act had never been adopted by popular vote in Lee County. The Court said:

"The Tick Eradication Law is and was general in its na- [fol. 29] ture, but by express enactment did not become effective in certain counties among them being that of realtor's residence, till January, 1922; however, by the other terms of said statute, the counties in which the taking effect of said statute was postponed were given the power to vote in local option elections held in them, upon the proposition of making said law sooner effective. Of this privilege the people of Lee County availed themselves in 1919, and by local option election held voted upon themselves the provisions of said Tick Eradication Law as same then were. There would seem no denial of the legal proposition that was then voted into existence as then applicable to said county at said election was the law as it then existed. * * * The principle discussed and the rule announced in the Dawson case is seemingly sound and is to the effect that when, by a vote of the people of a particular county, they have enacted in such county a given statute or put themselves under the operation of a general statute, they must be deemed to have voted upon themselves only the law as it then was, and amendments or

changes to such general law made by the legislature thereafter will not be effective in such county unless and until its people have voted upon themselves the law as so amended or changed. * * * The general tick eradication law was amended in 1920 in material matters. These amendments were never submitted to the people of Lee County. Had they been part of the general law at the time said local option election was held in 1919, who is to say that the vote would then have been favorable to the immediate effectiveness of said law? The law as it was after the amendment of 1920 became a part of it was at no time submitted to or voted into immediate effect by the voters of said county."

This case was very ably presented to the Court. In passing upon the case the Court commented upon the able brief presented on behalf of the State in its position for rehearing.

This case has been approved and cited by the same Court in Ex parte Ash, 269 S. W., page 435, decided February, 1925. In that case Ash was prosecuted for allowing his cattle to run at large. The facts were that in the year 1903 [fol. 30] the Legislature passed an act forbidding farmers to allow their stock to run at large. The only penalties prescribed were damages, fees for empounding, etc. The Act contained the local option clause providing that the law should not go into effect until adopted by the people of the locality and the people of the locality did adopt the act in September, 1903.

In 1907 the Act was amended by adding a fine as a punishment for violation of its provisions. The State attempted to prosecute Ash under the amended Act for allowing his cattle to run at large. The Court held that, inasmuch as the amended law had never been submitted to the local district for approval by vote of the people, the amendment had never been adopted and prosecution would not lie. The Court said they had already passed on that question in the case of Ex Parte Jank, and upheld that decision. The Court said:

"We are constrained to believe that when, under the permissive clause of our Constitution and under legislative sanction, the body of the people in any given territory are

called on to decide whether they will vote upon themselves the mandates and provisions of laws not theretofore in operation in such territory, and they do so vote them into such operation, the punitive provisions of such laws then in force cannot be made more severe by legislative enactment and be held operative in such territory unless and until the citizenship thereof themselves adopt by their own vote such law with its more onerous provisions, or else the laws under which the exercise of the law-making power by the people in said territory be repealed. We think this doctrine applicable in this case. The stock laws relative to horses, cattle, etc., as they were upon our statute books in 1903, when this local option election was held in the precinct under consideration, did not contain any provisions punishing those who violated the terms of the law. Neither realtor nor those in his precinct have ever agreed by their vote to submit themselves to a law having such penal provisions in it. Of course, they might have voted such law into effect, but the question is that they did not. Since they did not, we are constrained to follow the path so well outlined by our predecessors, and to hold that realtor cannot [fol. 31] be persecuted under the penal provisions which were not in the law at the time it was adopted in said precinct."

While those cases were criminal cases arising under the statute, the question (the right to exercise an option) was decided on the construction of the statute, and the same rules as to construction would apply in civil cases as in criminal cases. However, the Cedar Rust Law provides, in Section 3 and 5, that if the owner of cedar trees failed to carry out any orders which the State Entomologist may give as to treating cedar trees, or obstructs the Entomologist, the owner would be guilty of a misdemeanor and would be fined not less than five nor more than fifty dollars for the act. These cases therefore are in all respects directly in point.

Further argument can scarcely be needed in support of the proposition that the adoption of the statute, prohibiting cedar trees within a one-mile radius of an orchard, cannot be held to extend to and operate as an adoption of a subsequently enacted statute, prohibiting them within a two-mile radius.

But further, when the Legislature, without providing that previous adoptions of the original act should continue in force, amended the first section of the Act by striking out the words "one-mile" and substituting therefor the words "two-miles," thus working a fundamental, basic change in the law,—the effect as petitioners submit, was at once to annihilate the previously existing adoptions of the original Act. The statute prohibiting cedar trees within the one-mile radius no longer exists. It is as though that Act had been expunged from the records and a new one consisting of the first section, as amended, and of the remaining sections unaltered, had been at the time of the amendment, freshly enacted.

To hold that the adoption by the Supervisors of the prohibition of cedar trees, being host plants, within one-mile of an orchard, as distinctly provided in the Act as adopted, also, of another after enacted statute, prohibiting them within a two-mile radius, would be so glaringly at variance with the common understanding of the effects of human conduct, that it is unthinkable that this Court would tolerate the suggestion.

The adoption of the original must be regarded as repealed as a necessary consequence of the amendment, because the Act adopted was itself thereby repealed.

[fol. 32] The case is in no sense one in which the Supervisors, under legislative authority to do so, have themselves enacted a prohibition of the trees. The Legislature has never attempted to delegate to the Supervisors the power to legislate on the subject of cedar trees. The original Act is the complete expression of the legislative will, and the Supervisors, under it, are wholly without power to add to it in anywise, to take anything from it, or in any degree alter or modify any of its provisions. The power of the Supervisors is absolutely limited to the performance or non-performance of a condition, upon which the applicability of the statute to their county, or to any magisterial district thereof, depends.

If the Supervisors, pursuant to legislative authority, had enacted a valid regulation or prohibition of the maintenance of cedar trees, it may be that such regulation or prohibition would continue in force notwithstanding a subsequent enact-

ment by the Legislature, dealing with the same subject. But the mere adoption by them of a Statute afterwards repealed, obviously cannot perpetuate the repealed statute.

A different view of the effect of the amendment would result in the anomaly that in counties where the adoption preceded the amendment, the prohibited radium would be one mile, while in those where the adoption succeeded the amendment, the radius would be two miles, and this notwithstanding there is no indication in the Act itself that the Legislature intended anything other than that the law would be uniform in the territories for which it is adopted, and that there is no reason inhering in the subject matter which would constitute a reason for any discrimination.

While it may be that the Legislature might, if it had seen fit, have perpetuated by a saving clause, adoptions made prior to the amendment, it is a fact that there is no such saving clause. That there is none, must be regarded as indicative of the legislative intent that there should be no such perpetuation, but that the whole matter is to be controlled by the amended, new statute.

The contention that the Act of 1920 operated a repeal of the first section of the Act of 1914 (carried into the Code as Section 885), finds ample support in the authorities.

In Anderson v. Commonwealth, 18 Grat. (59 Va.) 295, it is said, at page 300:

"A subsequent statute may be inconsistent with part [fol. 33] of a former statute, and so operate as a repeal of that part by implication."

It is patent that the Act of 1914, deleted of the section thereof which establishes the radium within which cedar trees are prohibited, the vital part of the statute is no longer capable of enforcement—the amendment repealed it by the Court. * * * But where the later statute was

In Somer's case, 97 Va., at p. 760, it is said:

"The repeal of a statute by implication is not favored by the Court. * * * But where the later statute was plainly intended to embrace the whole legislation on the subjects to which it refers, and to be wholly substituted for all former statutes on the same subject, it must be held to be a legislative declaration that whatever is embraced in

it shall prevail and whatever is excluded is discarded and repealed."

See, to the same effect, Van Sant v. Commonwealth, 100 Va., 135.

While the Legislature, in 1920, did not amend those parts of the statute following what is now Section 885, they constitute no part of what is intended, by the above cited authorities, as the "legislation" on the subject. The unrepealed and unamended provisions merely direct the method of enforcement, and provide the condition on which the Act shall become operative in a give territory. The legislation, so far as concerns the present question, consists in the prohibition, and the amendatory act contains the whole of that legislation. It follows that for that reason, and because the probihited radius differs in the two statutes, it is the later statute to which reference must be made to ascertain the existing law, and that Section 1 of the 1914, (carried into the Code of 1919 by the Revisors) is, by the new statute, wholly superseded and repealed.

In Somers case, supra, this Court says:

"The amending act refers directly to the act amended and makes it in part, the subject of the amendment. It amends it so as to read as follows; that is, in the words of the amendatory act. It is manifest that the amendatory act was intended to be a repeal of all parts and provisions of the act which were omitted from it. It is necessarily implied that what is left out is no longer in force."

[fol. 34] A fortiori, that for which a different provision is substituted "is no longer in force." Here, as in the Somers case, the section amended is directly referred to in the amendatory act, which makes it "read as follows." Acts 1920, p. 370.

As already argued, Section 893, (requiring the adoption), not having been amended nor directly repealed, remains in full force.

So that by the two provisions, as they stand today, it is provided, in effect, that under certain circumstances set forth in Section 885, as amended, no red cedar trees may be maintained, provided and on condition, that Section 885 as amended shall have been adopted in the manner prescribed by Section 893.

In Davies v. Creighton, 33 Gratt. (74 Va.) at 698-9, it is said:

"There may also be acts intended to include the whole legislation on the subjects to which they refer, and to be substituted wholly for the former Acts on the same subjects; and in such cases, the provision of the former law on the same subject, although not expressly embraced in the subsequent acts, are impliedly repealed."

The Act of 1920, while in form an amendment of Section 885, operated in facts for the reasons set forth above, a repeal of Section 885 in that part thereof relating to the radium of the prohibition, and such repeal of the statute, necessarily carried with it a repeal of the adoption theretofore made.

This may appear more clearly if one considers a case where a statute like the one here involved, requiring adoption as a condition of its operation within a given territory, after having been so adopted, is simply repealed, with no new enactment following. Obviously, the statute would not continue to operate in the territory to which such adoption applied.

Here, a statute, after adoption, has been changed in its main, fundamentally substantial feature. It is no longer the statute so adopted. The new statute is, like the first, not one which operates ex proprio vigore, but is likewise condition for its operation in any subdivision of the State, upon its adoption by the local authorities. No such adoption of the new law has occurred. The previous adoption has been annulled by the Act of the Legislature—the supreme law-making power. So that, because of lack of [fol. 35] adoption of the amendatory act—in substance a new statute—there is not in force ih Shenandoah County, any law under which the destruction of the cedar trees may be required.

It is no answer to say that because a two-mile radius of necessity includes a one-mile radius, petitioners, whose trees are within the latter, can not complain that they are required to suffer their destruction, not withstanding the amendment, repealing the original Act in that part thereof which deals with the scope of territory within which the prohibition is applicable.

If it be correct, as the authorities already cited hold—and of the soundness of their conclusions it would seem there can be no doubt—that the substitution by the amendatory act here, in the very basic portion thereof,—operates as a repeal of the original Act in that portion thereof which deals with the same matter—then the old Act, in that respect, is annihilated—it is as though the Legislature had never acted on the subject. Until the adoption of the new Act, in accordance with the unrepealed section requiring the adoption, there is no existing law under which the trees, in any part of the county are to be regarded as a nuisance.

As pointed out, the trial Court rejected the evidence tendered by petitioners, tending to establish that the cutting down of the cedar trees here involved would result in a diminution of the market value of petitioner's land, to the extent from five to seven thousand dollars. This evidence, petitioners submit, was entirely admissible, not only because the taking or destruction of so great a value in order to the enhancement of the value of the property of the owners of orchards, or for any other purpose—not constituting a public use—can not be constitutionally accomplished, which proposition is argued above, but because, even upon the concession, aguenda, of the validity of the statute, it is thereby (in Section 891) expressly provided that the Court, upon the hearing of the appeal from the Entomologist's order "is hereby authorized to pass upon all questions involved, and determine the amount of damages, if any, which will be incurred" (plainly meaning sustained) "by the owner in case said (cedar) trees are destroyed."

The trial Court, in its order, seeks to justify its exclusion of the evidence so tendered by the statement that the damages to be awarded are not to be ascertained upon the principles obtaining in the case of a taking under eminent domain, but are to be confined to such sum as will reim-[fol. 36] burse the owner for such damages only as result as an incident of the cutting, which the trial Court fixed at one hundred dollars. As appears further from said order, the trial Court was of opinion that the ruling under consideration was required by a like ruling of this Court in Bowman v. Entomologist, supra, and at least derived

much support from provisions like rulings of the same trial Court in similar cases, and what it understood to be similar rulings by other trial courts.

Obviously, as it seems to petitioners, there can be no legal justification of the repetition by a trial court, of error on the ground that it had frequently committed the same mistake. Nor is there any such justification in the fact, if it be a fact, that some other court, by whose views or rulings the trial Court is not bound, has been once or one hundred times guilty of the same error. Petitioners have not access to the previous rulings of the learned trial Court, nor to those of other courts referred to in said order (except the Bowman case), and is therefore without knowledge of what those rulings were, or on what state of the proofs they were made.

But as to Bowman v. Entomologist, decided by the Court, the learned trial Court is under a perfectly patent misapprehension, from which it may possibly be inferred that it was under a like misapprehension as to the rulings in other jurisdictions.

In Bowman v. Entomologist, 128 Va., at top of page 360, it is distinctly said by Judge Sims, as part of the concluding sentence of his statement of the case:

"The owners raise no question in the cases with respect to the amount of the damages and expenses allowed."

The question, therefore, in this Court, is an open one.

With the greatest deference to the learned Judge of the trial Court, petitioners find it wholly impossible for them to understand upon what reasoning it reached the conclusion, in face of the easily understood unambiguous language of the statute itself, that no compensation is to be awarded for the value of petitioners' property which, if the trial Court's order be enforced, will be destroyed and lost to him.

The statute requires that Petitioners be paid the "damages incurred by them, in case said trees are destroyed." No words that the legislature could have employed could possibly more clearly indicate its intent that all damage "incurred by"—inflicted upon or sustained by—the owner [fol. 37] is to be determined by the Court and paid to the owner. Perhaps in most cases, and most certainly in that

at bar, the real, grevious injury to be incurred by the owners is not such as may be inflicted upon the soil by the act of cutting and removing the trees, but that which will result from the diminution in value of his freehold.

The fact that by the first section of the statute, Sect. 885—the cedars, in the condition and situation as therein set forth, are declared nuisances, can not, even as to such trees as constitute host, harbor, or source plants—and, a fortiori, not as to trees not of that character—take away the right of the owner to the compensation for his property loss, resulting from their destruction. The amount of that loss is manifestly the diminution in the market value of the land. That is the damage incurred by the owner. The payment of the damages so incurred is one of the conditions, imposed by the legislature, upon which the enforcement of the statute depends.

It is true that there are decisions to the effect that it is within the discretion of the legislature to allow or withhold damages, resulting from the destruction of property which it has validly declared a public nuisance, but there are no decisions so far as petitioners' research has extended, to the effect that the legislature may not provide for compensation to such owner for the loss which the statute imposes.

If otherwise valid, a construction of the statute under which actual, valuable property is to be destroyed as a nuisance, without compensation to the owner therefor, would render the statute obnoxious to the Fourteenth Amendment, and void.

This is the unquestionable effect of the utterance of the Supreme Court of the United States in Chicago, &c. R. R. Co. v. Illinois, 200 U. S. 261, 50 L. Ed., wherein it is said at page 509 of the last mentioned edition:

"Private property can not be taken without compensation for public use, under a police regulation relating strictly to the public health, the public morals, or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare."

This language is equivalent, of course, to a direct statement that property can not be taken (or destroyed), where it is of appreciable value, without compensation under a

police regulation enacted to promote even the general welfare.

[fol. 38] Petitioners assign the following errors in the judgment and order complained of:

1. The failure of the trial court to hold that the provisions of said statute are invalid, because in conflict with the first clause of the Fourteenth Amendment of the Constitution of the United States, in that by an enforcement of said statute, petitioners' property will be taken without due process of law;

2. The failure of the trial Court to hold said statute invalid, as opposed to said clause of said amendment, because its enforcement will deny to petitioners the equal protection of the laws; and will contravene the principle inhering in government, forbidding the taking or destroying of private property, not for a public use, but for the promotion of the welfare of individuals;

3. The failure of the trial Court to hold that said statute is invalid because of vagueness and indefiniteness;

4. The failure of the trial Court to hold that said statute, because of the provision thereof whereby it is to become operative as to any particular locality, by virtue of the action of ten or more freeholders, is void, because in conflict with said provision of the Fourteenth Amendment of the Federal Constitution guaranteeing to all citizens the equal protection of the laws, and inhibiting the taking, or destruction of property without due process of law;

5. In holding that there is in force in Lee Magisterial District of Shenandoah County, any law requiring the destruction of any cedar trees;

6. In holding that, even if the said statute is in force in said County and District, that all of the red cedar trees on petitioners' land are subject to destruction, whereas, in any event no red cedar trees other than such as are or may be source, harbor, or host plants of cedar rust are included in the denunciation of the statute;

7. In rejecting the evidence tendered by petitioners tending to prove that by reason of the destruction of said cedar trees (if the same be destroyed) petitioners will sustain

damage to the extent of from five to seven thousand dollars because of the consequent diminution of the market value of petitioners' land;

8. In holding that the statute does not require that compensation shall be made to petitioners for any diminution in the market value of their land resulting from such destruction of the cedar trees thereon; or if the statute does not provide for such compensation, in holding that the same [fol. 39] is not void as in contravention of said first clause of the Fourteenth Amendment of the Constitution of the United States.

For these and other errors, to be assigned at the hearing, petitioners pray that they may be awarded a writ of error and supersedeas from and to said order and judgment of the Circuit Court of Shenandoah County, and that the same may be reviewed and reversed by this Honorable Court.

And petitioners will ever pray, &c.

Julia V. Miller, Ada V. Miller, C. O. Miller, Petitioners. C. W. Bennick, D. O. Dechert, Counsel.

I, D. O. Dechert, an attorney-at-law, practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion there is error in the order and judgment of the Circuit Court of Shenandoah County, complained of in the foregoing petition, for which the same should be reviewed and reversed by said Supreme Court of Appeals.

D. O. Dechert, Attorney.

Received March 19, 1926. M. P. B.

Writ of error and supersedeas awarded. Bond $500.00.

M. P. Burks.

[fol. 40] In Circuit Court of Shenandoah County

State Entomologist

vs.

Julia V. Miller, &c.

Agreement of Counsel as to Notice

The original notice of the State Entomologist to Julia V. Miller requiring her to cut the cedar trees, was for some

reason withdrawn from the papers of this suit before the trial of this case and not returned.

Attorneys for the Plaintiff and the Defendants agreed that notice was properly given and served and an appeal properly made and the case properly docketed for hearing.

Otto V. Pence.

Number of acres in property: ——.
Distance from Court House: ——.,
Distance and direction from nearest post office: ——.

To the Virginia State Entomologist; Blacksburg, Virginia.

Sir: We, the undersigned reputable free-holders of Lee Magisterial District, in the County of Shenandoah, State of Virginia, hereby apply to you for relief by reason of certain red cedar trees growing on the farm of —— ——, located in said district, in accordance with Chapter 36, of the Acts of Assembly of Virginia, 1914, entitled: ——.

Care Dr. W. C. Shirley

Name of land owner	No. of acres in farm	Distance from court-house, direction, & nearest P. O.
Mrs. Elizabeth Shirley	50	18 North, New Market, Va.
Dr. W. C. Shirley	56	18 North, New Market, Va.
Jas. K. Pickering	81	18 North, New Market, Va.
Mrs. Frank Zirkle	125	19 North, New Market, Va.
W. H. Dove	167	20 North, New Market, Va.
Mrs. Julia V. Miller	155	18 North, New Market, Va.
Mr. George Comer	2	19 North, New Market, Va.
Advent School property	15 more or less	19 North, New Market, Va.

[fol. 41] "An Act providing for the control and eradication of the apple disease commonly known as orange or cedar rust in the magisterial districts and counties of this State where the said disease is prevalent."

We, the ten or more reputable free-holders whose signatures are attached to the petition, hereby aver that the red cedar trees located on the farm of the party hereinabove mentioned are within one mile of a number of commercial orchards, and that these cedar trees are the harbor and source of the communicable disease known as "Cedar

Rust of the Apple'' and constitute a menace to the health of said orchards.

We, the undersigned ten or more reputable free-holders hereby respectfully petition the State Entomologist that relief be accorded to the said orchards which are menaced by the existence of said cedars, in accordance with the provisions of the aforesaid Act of Assembly.

Turkey Knob Orchards. G. E. Gudebrod, Pres. D. O. Foley, W. H. Tisinger, Chas. C. Bowman, E. E. Bowman, Mary C. Lutz, J. W. Smootz, J. B. Spitzer, H. C. Chapman. Mt. Clifton Orchards, Inc., per T. M. Parkins, Supt. T. R. Byrd, Scott Grant, W. R. Doll, Chas. H. Doll, A. B. Bushong, J. A. Kagey, R. L. Fadeley.

[fol. 41a] Commonwealth of Virginia

Office of the State Entomologist and Plant Pathologist

W. J. Schoene, State Entomologist, Blacksburg, Va.

January 8, 1923.

To Mrs. Julia V. Miller, New Market:

You are hereby notified that upon the petition in writing of ten or more reputable freeholders of Lee District, in the County of Shenandoah, in the State of Virginia, the undersigned State Entomologist, acting under the provisions of an Act of the General Assembly of Virginia entitled

''An act providing for the control and eradication of the plant disease known as 'Orange' or 'Cedar rust' approved March 4, 1914, has made a preliminary investigation of the locality from which said request was received, to ascertain whether any red cedar tree or trees in said locality are the source of, harbor, or constitute the host plant for the said disease known as 'Orange' or 'Cedar Rust of the Apple' and constitute a menace to the health of any apple orchard in said locality, and whether said cedar tree or trees exist within a radius of two miles of any apple orchard in said locality, and that upon said investigation being made, the undersigned State Entomologist has ascertained that upon that certain tract of land owned by you contain-

ing 155 acres, located 18 mi. N. of C. H. there are red cedar trees which constitute the source of, harbor or host plant for said disease known as 'Cedar Rust of the Apple,' and that said cedar trees exist within a radius of two miles of a number of apple orchards in said Magisterial District, and constitute a menace to the health of said apple orchards; and that certain of the apple orchards in said locality and within said radius have been materially affected by said disease, and the owners thereof have thereby been greatly prejudiced and damaged, and that said apple orchards are subject to be affected by said disease so long as said cedar trees are allowed to remain standing upon the tract of land owned by you, situated in said Magisterial District, and that in the judgment of the undersigned State Entomologist it is deemed proper and necessary to destroy all the red cedar trees now growing upon said tract of land hereinabove described; and you are accordingly hereby ordered and required to cut down and destroy all the red cedar [fol. 41b] trees now growing upon the said tract of land hereinabove described on or before the 11th day of February, 1923, in the manner prescribed and as provided in said Act of the General Assembly of Virginia, approved March 4, 1914; all of which you are hereby notified.

W. J. Schoene, State Entomologist.

A copy. Teste: Otto V. Pence, Clerk.

It is agreed by counsel for plaintiff and defendants, respectively, that the foregoing copy may become and be treated as a part of the record of the case of State Entomologist v. Julia V. Miller &c., now pending in the Supreme Court of Appeals of Virginia on a writ of error awarded on the petition of the defendants, without the necessity of a writ of certiorari to bring the same before said Court.

D. O. Dechert and C. W. Bernard, Counsel for Julia V. Miller, &c., Plaintiffs-in-Error, Defendants in Court below. R. L. Tavenner, Attorney for State Entomologist.

4-4-26.

IN CIRCUIT COURT OF SHENANDOAH COUNTY

[Title omitted]

GROUNDS FOR DEFENSE

At the trial of the above styled action the defendants will rely upon the following grounds of defense:

1. The provisions of the Legislative Act under which the pretended authority of the plaintiff to require the destruction of the red cedar trees in the notice mentioned and referred to is derived are void because they are arbitrary and constitute class legislation.

2. Said provisions of said Act are void because contrary to the first clause of the Fourteenth Amendment of the [fol. 42] Constitution of the United States, and to the principles inherent in the fabric of government in that they purport to authorize the taking and damaging of private property, not for a public use, but for the benefit of private owners of orchards;

3. Neither the said Act, nor any amendment thereof, was at the commencement of this proceedings, or is now, in force in Shenandoah County, nor in Lee Magisterial District thereof. By the terms of the said Act it is without force or effect in any part of said county unless and until adopted by the Board of Supervisors of said County for the County or for the particular Magisterial District thereof. In its original form the area in which by said Act cedar trees were condemned was one mile of an orchard, and it is not averred that any of the defendants' trees are within one mile of an orchard. Subsequently, said Act was amended by extending the area to two miles of an orchard, but it still remained and remains that in order to become effectual in any Magisterial District of said County it was required that said amended Act be adopted for that District by said Board; and it is not averred in the notice that said amended Act has ever been so adopted; so that neither said original Act, nor said Amended Act, is now in force in any part of said County.

4. That defendants' cedar trees do not constitute a menace or nuisance to any apple orchard within the radius

of their prohibition by any law nor or at the giving of said notice in force in Lee Magisterial District, in which District said trees are located.

5 That it is not true that any, or if any, that all of defendants' trees, which by said notice defendants are required to destroy, are or may be the source, harbor, or host plant of the disease known as cedar rust of the apple.

6. That is it not true that if any of said cedar trees are or may be such source, harbor, or host plant, they are not susceptible of such treatment as will render them harmless.

7. That it is not true that any, or if there be any, it is not true that all of such trees referred to in the notice, are located where their maintenance is prohibited by any law now, or at the time of the giving of said notice, in force in Lee Magisterial District; and

8. That the trees whose destruction is sought by this proceeding are of great value, and that their destruction will result in a decided dimunition of the value of defendants' land, for which value and diminution defendant is entitled to compensation.

C. W. Bennick, D. O. Dechert, Attys. for Defendants.

[fol. 43] In Circuit Court of Shenandoah County

[Title omitted]

Statement of Evidence

Caption

Transcript of Testimony in Above-entitled Case, Introduced Before Hon. Frank B. Whiting, Judge, at Woodstock, Va., Wednesday and Thursday, January 20 and 21, 1926

Hon. F. S. Tavenner, Counsel for State Entomologist.

Mes-rs. D. O. Dechert and C. W. Bennick, Counsel for the Defendants.

[Title omitted]

Certificate of Exceptions No. 1

The following evidence, on behalf of the plaintiff and of the defendant, respectively, as hereinafter denoted, is all the evidence that was introduced on the trial of this cause.

On behalf of the plaintiff:

[fol. 44] STIPULATION RE INTRODUCTION OF EVIDENCE

Stipulation of Counsel.—It is stipulated between Counsel that Counsel for the defendant waive the introduction of evidence to show that the petition upon which the notice to the defendant from the State Entomologist is founded was properly signed by the requisite number of free-holders; and waive any right to raise any question predicated upon the lack of such proof.

W. J. SCHOENE, sworn, examined by Judge F. S. Tavenner, testified:

Q. What is your occupation, Mr. Schoene?

A. State Entomologist.

Q. How long have you been State Entomologist for the State of Virginia?

A. Since 1913.

Q. Where were you educated for your work?

A. I got my undergraduate work at the Kentucky State University, and my practical experience at the New York Experimental Station.

Q. Were you at any time connected with the Cornell University?

A. Only as a student. I was a student there for a short time.

Q. Among your duties as State Entomologist have you charge of the work of eradicating cedar rust in Virginia?

A. Yes, sir.

Q. What has been your opportunities to learn and know of the character of this disease, or trouble, and to know what is necessary for its eradication?

A. During my experience, naturally, in going around among these orchards, I have had an opportunity to see the effect of the cedar rust on York Imperial apples, and other varieties. The Yorks are usually very small when the cedars are nearby. The disease also affects other varieties, particularly the Ben Davis. In that it attacks the apple itself instead of the foliage. When cedars are near, as a rule, the fruit of the orchard is of no commercial value. It has been my experience that in the neighborhoods where these cedars have been removed that the orchards that had no marketable crop for, perhaps, a number of years, have immediately, the following season, produced fair crops of fruit, so far as the cedar rust disease is concerned. This was the experience in Augusta county following the cedar cutting campaign of 1922 and 1923.

[fol. 45] Q. How long has your department, with you as its chief, been engaged in the endeavor to eradicate cedar rust?

A. Since about 1915.

Q. What territory in Virginia has been most susceptible to the cedar rust trouble?

A. The territory in which the York apple is grown, namely, in the four or five counties of Clarke, Frederick, Shenandoah, Rockingham, and Augusta.

Q. I wish you would state just how that disease is communicated to the cedar from the apple, or from the cedar to the apple?

A. The disease lives over winter on the cedar tree in what is known as the cedar apple. With the coming of warm weather these cedar apples absorb moisture and produce spores, which spores are carried to the apple foliage by the wind.

Mr. Dechert: By "cedar apple" you mean what is commonly called cedar ball, do you not?

Witness: Yes, sir.

A. (contd.) After being carried by the wind to the leaf, these spores germinate very much in the same way as a seed, and the sprouts or roots penetrate the fleshy part of the apple leaf and destroy its vitality over that small area; so that where there are a number of spores that fall upon the leaf the entire leaf is destroyed.

Q. What is the life-cycle of the cedar rust spore?

A. Several months are required for this disease to develop on the apple foliage; another set of spores are produced which are in turn carried by the wind to the cedar trees, and this requires from twenty-one to twenty-two months to reach its mature or complete development on the cedar, so that the cycle is about two years in length.

Q. During the early stages in the development of cedar rust disease, do you remember whether or not it was biannual in its habits of devastation?

A. You mean, in its early stages of development?

Q. Yes, sir; in this territory.

Mr. Dechert: Do you mean, it recurs in the space of two years?

Judge Tavenner: Every other year.

[fol. 46] A. It seems that there are some years that it causes very much greater loss than in others, due to the fact that it is present in the foliage some seasons more than in others.

Q. To illustrate; if in the year 1925 it had happened that there was no cedar rust whatever, in 1927 would you expect any cedar rust?

A. If there had been none in 1925 there would be none in 1927 on the apple, but there might still be on the cedar that year.

Q. Of course, but I am speaking of being on the apple. In recent years, however, do you know whether the disease has been practically — annual disease?

A. It has.

Q. In some years it is not so serious as in others?

A. Yes, sir.

Q. Now, Professor Schoene, your department has devoted a great deal of time to the Valley of Virginia for the eradication of cedar rust in past years, has it not?

A. Yes, sir.

Q. And, therefore, your experience in the handling of this trouble has been very extensive, has it?

A. Yes, sir.

Q. I want you to state what remedy there is for this disease other than the cutting of the cedars where the cedar trees are within a short distance of the orchard?

A. There is no remedy, no practical remedy, except to remove the cedars.

Q. Is it the cedar tree itself that causes or creates the trouble, or is it a disease of the cedar tree that is doing the damage?

A. It is a disease which lives part of its life history on the cedar and part of its life history on the apple; the cedar itself would be innocent.

Q. Is the cedar ball, or cedar apple, in reality an apple at all?

A. No, sir; it is simply a cancerous growth on the cedar produced by the disease.

Q. Are the cedar balls injurious to the cedar trees as well as to the apple trees?

A. To some extent in the West, I understand——

Mr. Dechert: (Interposing) We do not care about it in the West. It is here, isn't it?

The Court: Objection sustained.

[fol. 47] Q. Your information is that it is a disease both of the apple and the cedar trees?

A. Yes, sir.

Q. Now, Professor Schoene, you have stated that the only practical remedy against the disease of cedar rust, where the cedars are in close proximity to the orchard, is the removal of the cedars; what distance from the orchard is regarded as reasonably safe to the orchard and the orchardist?

A. Two miles is regarded as reasonably safe, but in some instances this is not sufficient. The distance would depend upon the lay of the land, and, again, perhaps, on the intervening trees, and the direction the cedar trees are from the orchard. In some instances the cedars might be very close without being any damage, whereas in others they would be considerably further.

Q. In other words, that depends upon the state of the atmosphere, and, also, on the direction of the wind?

A. Yes, sir.

Q. You have spoken of two miles being reasonably safe as the limit; do you know whether any test has actually been made in this county with a view to ascertaining whether or not that distance is a reasonable and safe distance?

A. I don't believe I can answer that question.

Q. You were not associated with Professor Schneiderhan in making the test at Mt. Jackson?

A. No, sir.

Q. You have stated Prof. Schoene, that the trouble is caused by injury to the foliage of the apple tree, and in certain instances to the apple?

A. Yes, sir.

Q. How does it injure the foliage to be destructive?

A. The mycelium of the disease feeds upon the green tissue of either the foliage or the fruit and destroys this green tissue over the area it reaches.

Q. What is meant by the Mycelium?

A. It is another name for the tissue of the disease.

Q. Now, in the event there are one or two spots of cedar rust affecting the leaf, does that necessarily destroy the leaf?

A. No, sir; one or two spots would cause no appreciable damage to the leaf; but one spot would put the apple from a first class to, perhaps, a second or third class apple, with a reduction in price of a dollar to a dollar and a half per barrel.

Q. The character of the disease, however, so far as it [fol. 48] relates to the York Imperial is such that the foliage alone is severely injured?

A. Yes, sir.

Q. In that case how is the apple affected?

A. When the foliage is reduced by reason of the disease, the apple fails to develop.

Q. Explain what you mean by the foliage being affected?

A. The leaves turn yellow and a large per cent drop off about mid-summer, or in August, and the trees have no foliage for maturing the fruit.

Q. You mean to say that these leaves become so infected by the flying and falling sporidia that the leaves themselves are destroyed?

A. Yes, sir, their efficiency as machies are destroyed.

Q. The leaves of the trees are called the lungs of the trees?

A. Sometimes; yes, sir.

Q. You find the leaves on some of the York Imperial apple trees, showing infection, to be pretty well spotted with cedar rust?

A. Yes, sir.

Q. And the effect of that is to destroy the life of the foliage?

A. Yes, sir.

Q. Now, to illustrate that; do you remember just what is the appearance of a York Imperial orchard, say, in the early part of August, where there has been a serious infection of cedar rust?

A. The entire orchard is yellow—has a yellow color.

Q. And the yellow color means what as to the foliage of the trees?

A. It means that the foliage has lost its usefulness.

Q. What effect does that have upon the York Imperial apples?

A. They quit growing; they stand still.

Q. In other words, an orchard pretty badly infected with cedar rust fails to develop its fruit?

A. Yes, sir.

Q. Now, what other vari-ties of apple in this territory are affected by cedar rust?

A. Well, after the York Imperial, the Ben Davis is the apple which is rather largely planted, and, perhaps, ranks next.

Q. To illustrate, as I know the vari-ties pretty well around here; how does it affect the Wealthy, the Wagner, the Jonathan and the Rome beauty?

A. The Jonathan is even more seriously injured than [fol. 49] the York; the Wagner is now about on a parallel with the York; and the Rome Beauty is almost as seriously injured.

Q. Do you know whether any variety of apple can be said to be perfectly immune from cedar rust infection?

A. I don't know any variety that is entirely immune, but some vari-ties are practically immune.

Mr. Dechert: Will you name those vari-ties that are immune, or practically so?

Witness: The old Winesap is almost immune.

Mr. Dechert: Is that all?

Witness: The Staymen Winesap is somewhat immune, but perhaps more susceptible than the old Winesap. It resists the disease fairly well.

Mr. Dechert: Are there others?

Witness: There are others, but those we have been discussing are the principal commercial vari-ties here.

Mr. Dechert: I would like for you to finish, if there are others?

Witness: I do not believe I can name any more.

Q. Now, let me ask you whether or not such vari-ties as Maiden Blush, Grymes Golden and Delicious that heretofore had been regarded as practically immune are now affected by it?

A. Yes, sir. It seems that the idea of the horticulturist regarding immunity is changing somewhat, because some vari-ties that originally were thought to be immune——

Mr. Dechert: I object to that.

Q. As a matter of fact, do you know that those vari-ties are not affected by cedar rust?

A. Yes, sir.

[fol. 50] Q. What vari-ties in this territory are regarded as the marketable vari-ties of apple?

A. The Yorks, the Bens, the Black Twigs, and the Winesaps, I think, are the principal vari-ties of commercial apples.

Q. Professor Schoene, you are State Entomologist, and as such it became you- duty to send out notices to the defendant in this case, Mrs. Julia V. Miller?

A. Yes, sir.

Mr. Dechert: At lease, he sent it to her.

Judge Tavenner: Yes, sir; he sent it.

Q. Is this notice of January 8, 1923, the notice to which you refer?

A. Yes, sir. This is a copy of the notice.

Judge Tavenner: This notice is filed as part of the record in this case, marked "Exhibit Schoene No. 1."

Q. Was this based upon the petition that was presented to you?

A. Yes, sir.

Q. And was given after an examination had been made to see whether or not the cedars were the source of the infection at that place?

A. I did not examine those particular trees before I fixed up that notice. We served the notice and examined the trees at the same time.

Mr. Dechert: That was a remarkable thing.

Q. In other words, if there were no trees as the source of the infection no notice would have been given?

A. No, sir. A great many were not served.

Mr. Dechert: It looks like they decided the case and then heard the evidence.

Q. Did Mrs. Julia V. Miller respect the order, and cut down and destroy these cedar trees?

A. No, sir; an appeal was noted.

Q. Will you state whether or not you have recently made [fol. 51] a further examination of the Julia V. Miller premises to ascertain whether or not there are cedar trees thereon constituting a menace to the apple orchards of that territory?

A. Yes, sir; I have.

Q. Just state to the Court when you made the observation and what it disclosed?

A. I was there yesterday afternoon, and we found a great many cedars there with cedar apples. The cedars are in a community where there are a great many apple trees.

Q. How are those cedar trees located on the premises?

A. Lining the road from the Valley Pike to the house there is about 200 trees; then on the ridge parallel with the Valley Pike and on the west side of the ridge there are a great many cedars; then scattered about in some of the pasture fields there are a very large number of cedar sprouts.

Q. Give some idea of the dimensions of those trees, if you know, and whether they are of any real value?

A. There are a few of those trees that are, perhaps, 10, 12 or 14 inches in diameter—across the tree.

Mr. Dechert: That is with the trunk?

Witness: Yes, sir; a few of them.

A. (contd.). The greater portion of the cedars, however, are perhaps what would be called second growth

cedars; they are from 3 to 5 or 6 inches in diameter. The trees are growing on a rocky hillside.

Q. State, if you will, to what extent the real estate would be injured in the actual cutting of these cedar trees provided they were cut with ordinary care and the brush destroyed?

A. Well, on the hillside there is no grass under the trees, and in many places there are rock-brakes where the brush could be burned without any injury. It is possible, in some places, the cedars could not be moved without damage to the fences. I do not think there would be any damage to the land.

Mr. Dechert: You mean there would be no injury to the soil by the act of removal?

Witness: To the soil; yes, sir.

[fol. 52] A. (contd.). These cedars along the road, certainly that would not injure the soil, to remove the cedars along the road, or the grass.

Q. You have spoken of some cedars growing along the road, do you mean the public road or a private road?

A. You will have to ask somebody else. I do not know all the roads in Shenandoah County.

Judge Tavenner: Mr. Charley Miller, what is it?

Mr. Charley Miller: It is a public road.

Q. You have spoken of cedar trees along the road, would the cutting of those trees entail any injury upon Mrs. Julia V. Miller?

A. I think there are only 9 of those trees on the inside of this fence. I don't know whether the fence is in the right place or not.

Q. You mean on the field side?

A. Yes, sir.

Mr. Dechert: Is not the law of Virginia in force in Shenandoah County. Doesn't a man own to the middle of the road?

Judge Tavenner: Yes, sir; a man owns to the middle of the public road, but the county has the right to cut the cedars if they are in the roadway.

Q. You have stated that pasture does not grow well under these cedar trees; from your observation, will you

state whether or not pasture or crops grow well under cedar trees?

A. Don't anything grow under cedar trees.

Q. In the event those cedars should be cut down, say, to six inches of the ground; that the trees were trimmed closely and to a size not greater than 2 inches at the smallest end, and the limbs were trimmed into wood and to a size not greater than 2 inches at the smallest end; the brush piled and burned, and all done with ordinary care; what injury would be sustained by reason of these operations by Mrs. Julia V. Miller?

Mr. Dechert: Question is objected to as not relevant as to the measure of damage. The question of whether the [fol. 53] soil is injured does not enter into this question at all.

Objection over-ruled, exception for defendant.

A. The trees along this drive would probably have to be removed before the brush was burned—the brush would have to be removed, because I imagine they would not permit the State Entomologist to burn the brush in the county road. I understand it is a county road. The cedars on the hillside, however, could be destroyed without any damage to the sod because there is practically no sod there now. There are many rocky places and outcrops of rocks on which the crush could be burned without destroying such sod as is present.

Q. I will ask you to file your petition as an exhibit in this cause, marked "Exhibit Schoene No. 2," together with the notice that was served upon Mrs. Julia V. Miller, marked "Exhibit Schoene No. 3," as a part of your evidence.

A. Yes, sir; I now file same, as requested.

Q. Now, Professor Schoene, had you made any previous examination of these cedar trees in person, yourself?

A. Yes, sir.

Mr. Dechert: Previous to what?

Judge Tavenner: The last time he is speaking of. He said he was there a few days ago.

Q. Had you been upon the premises previously?

A. Yes, sir.

Q. More than once?

A. Yes, sir.

Q. Just tell the court what you found?

A. I have already indicated that the cedars were there.

Q. What about their condition? Did they contain cedar balls or not?

A. Yes, sir.

Q. To what extent?

A. We did not examine all the cedar trees on the premises, but all the trees we did examine had cedar balls, and we made special note of that on each tree; we found cedar balls on every cedar tree that we searched for them.

[fol. 54] Q. Now, the Act says that not only trees that are actually a menace, but that may be a menace, are declared a nuisance; will you state whether or not a cedar tree whether it actually contains cedar balls or not, is a menance to the apple orchard?

A. In my judgment it is; yes, sir.

Q. Why so?

A. Because it may contain cedar balls the following year, if it has none that particular year at the time of the examination.

Q. Are any red cedar trees immune from the disease?

A. No, sir.

Q. I will ask you to state whether or not in your examination and investigation of the cedar trees on that land you found any trees that were not infected with the cedar rust disease?

A. No, sir; we did not.

Q. Did you make any measurements to ascertain the distance from those cedar trees to apple orchards?

A. Yes, sir.

Q. What measurements did you make?

A. I measured the distance from the Driver orchard.

Mr. Dechert: That is in Rockingham County?

Witness: Yes, sir.

A. (contd.). To and through said cedars, measuring north along the ridge, with a tape-line, and the distance was—I have it written down *down* in a book—I think, 7,700 feet. I will get the book and see; but my recollection is that it was 7,700 feet from the orchard clear through the cedars on the ridge. The orchard is south from the cedar block.

Q. Is that merely from the edge of the Driver orchard?

A. Yes, sir; from the edge of the Driver orchard.

Q. How large an area is the Driver orchard?

A. I don't know.

Q. A good many acres?

A. Looks like 15 or 20 acres.

Q. Did you observe any other orchards?

A. Yes, sir; there are a number of other orchards in the vicinity.

Q. Small tracts, are they?

A. Yes, sir.

[fol. 55] Q. Do you know the names of any of the orchard owners?

A. The only party whose name I happen to know, in that vicinity is Mr. R. D. Hottle.

Q. He owns a small orchard, does he?

A. Yes, sir; he has about two acres.

Q. Do you know how that is located with reference to the cedar trees?

A. That is west, or, perhaps, a little northwest from these cedars, and on lower ground, and I should say it is just within a mile. We did not measure that distance to that orchard.

Q. You think that orchard is within a mile of those cedars?

A. Yes, sir.

Q. Are there other orchards in close proximity there?

A. There are other small orchards; I do not know the names of the owners.

Q. What other orchards are in that same general territory that would be affected by the cedar trees, more or less, though beyond the two mile limit?

The Court: I cannot hear*d* the evidence for the purpose of directing the cedars to be cut. Those orchards are beyond the distance prescribed by the Act; but the Court of Appeals held that was proper evidence as showing the value of the apple orchard industry in the community. (Point saved.)

A. There are a number of orchards. Mr. Bushong has an orchard, and Mr. Scott Grant, and from there towards Timberville there are a number of orchards.

Q. What orchards are in the vicinity of Timberville?

Mr. Dechert: Question is objected to.

Mr. Dechert: Do you mean that these orchards you are now referring to are likely to be affected from cedar rust from these trees in controversy?

Witness: If the wind happens to blow in that direction they might be.

Mr. Dechert: And happens to carry it far enough?

[fol. 56] Witness: Yes, sir.

Q. Has Mr. Tom Byrd an orchard in that vicinity?

A. That orchard is some distance away, I don't know exactly how far but five or six miles, perhaps.

Q. How far are they from the Turkey Knob orchard and other orchards in that direction, four or five miles?

A. Yes, sir.

Q. Mrs. Julia V. Miller's farm lies partly in Rockingham and partly in Shenandoah counties, does it not?

A. So I am informed.

Q. Did you find the county line?

A. Only as it was pointed out to me by Dr. Miller.

Q. Where did the line run?

A. The line comes across this cedar thicket at about, I suppose, seventy rods—perhaps that distance—south of the entrance of this county road into the Valley turnpike.

Mr. Dechert: What proportion of the cedars were there in Shenandoah County?

Witness: I should say about half. We have a count.

Q. Now, how did that line extend through the property, what cedars did it include? Did it include all along this road that you have mentioned?

A. Yes, sir.

Q. And around the buildings?

A. I think there are only one or two cedars around the buildings. The cedars are out on the hillside, and the line takes in about half of the hillside. I think, perhaps, half of the cedars are in Rockingham county. Mr. Willey has that evidence, if you call him.

Q. Professor Schoene, the fact that there are no cedar balls appearing on the trees, or few of them, does that

mean that the cedar trees is not already infected with the spores?

A. No, sir.

Q. What do you mean by that?

A. The cedar balls which occur in the summer of 1926 are already well-developed; but the cedar trees are already infected with the spores which are going to develop the cedar apples or cedar balls in the spring of 1927.

[fol. 57] Q. Can you easily discover those spores or infection that will develop in 1927?

A. No, sir.

Cross-examination.

By Mr. Dechert:

X. In fact, you cannot tell them at all, can you?

A. Not at this time.

X. So that you are unable to say that any of the cedar trees in controversy here which do not have cedar apples on them have that infection?

A. Yes, sir; you are correct.

X. As a matter of fact, the only trees that you can say constitute a menace to the apples are those which have cedar balls on them?

A. Yes, sir.

X. And you say you did not examine all these trees for cedar apples?

A. Well, on the second day in November, the second day of the hunting season, there were three of us that went up and down and across that area, and we saw most of the trees.

X. Did you yourself see most of them?

A. No, not myself; no, sir. I saw about a third of them.

X. Were the third of the trees that you saw infected with cedar balls?

A. I didn't expect to look at every tree, but every tree that I did stop and look at I found cedar balls on. As a matter of fact, the balls are very easy to find.

X. How many trees did you examine?

A. Critically, you mean?

X. Enough to find the cedar balls?

A. Probably fifty, perhaps.

X. And how many trees were in the area that you went over?

A. I don't know.

X. Three hundred and fifty.

A. No, not that many.

X. Three hundred?

A. I cannot answer that. I just do not understand what you mean; the area that I went over?

[fol. 58] X. That you were walking over?

A. I just zig-zagged this way (indicating) all over.

X. All that you know is that some of the cedar trees observed by you in the zig-zag course pursued by you were affected with cedar balls?

A. Yes, sir.

X. How many others in that grove you speak of were infected, if any, you cannot say?

A. No, sir.

X. Tell me some more about these varieties of apples which produce profitably in this territory and are not subject to this infection? Tell me how many varieties there are that are not subject to it?

A. I mentioned awhile ago the Ben Davis—I mentioned the old Winesap and the Staymen Winesap. Those are examples of the varieties which are supposed to be fairly resistant. In other words, the Winesaps will frequently stand out in a cedar rust year, whereas the York Imperial foliage will turn yellow.

X. Is that all?

A. I do not believe that I can go further on the question of varieties. I think, probably, there are some fruit-growers here that can give you the information from their personal experience.

X. I do not want them. I am not interested in them. When was it that you first observed that the Grymes Golden, the Delicious and the Maiden Blush were affected by cedar rust?

A. I do not believe I can tell you that.

X. About how long ago?

A. My interest—as I said awhile ago, my interest in this dates from 1915.

X. You said a while ago, though, that these varieties had not been originally thought by you to have been infected?

A. Yes, sir.

X. When was it you became of the contrary opinion?

A. I do not believe I know.

X. A year or two ago, or just this year?

A. I am not particularly interested in the vari-ties.

X. A while ago you were asked and answered under your oath about those particular vari-ties; I am asking you to answer a little further under the same oath, and you are not interested in answering those questions?

A. Yes, sir; I am interested in answering, but not interested in the varieties.

X. You were interested enough to answer Judge Tavenner?

[fol. 59] A. As far as I knew; yes, sir.

X. Are you here as a fair witness, trying to tell the truth, or are you an adherent of Judge Tavenner's, in your own case only?

A. I am trying to tell the truth.

X. Why are you not interested in answering my question?

A. I did not say that I was not interested in answering your question, but not interested in those varieties. I mean, I have not paid attention to the varieties.

X. However, you paid enough attention to be certain in your answers to Judge Tavenner?

A. I believe I have.

X. Mr. Schoene, the cedar balls are the actual source when the disease is passing from the cedar to the apple with the disease, are they not; or the cedar balls are the harbor or host plant of the disease?

A. Yes, sir.

X. By the way, that disease interchangeably arises either on the apple or on the cedar and is communicated from one to the other, isn't it?

A. Yes, sir.

By the Court:

Q. How many cedar balls have to be on a tree to be a menace?

A. Well, if the cedar tree was immediately in the orchard, one cedar tree would destroy, perhaps, the foliage on sev-

eral trees, because there are millions of spores in a single cedar ball.

Judge Tavenner: They have billions, don't they?

Mr. Dechert: Don't hump him up too fast, Judge Tavenner.

By Mr. Dechert:

X. Are the spores on the under or upper side of the apple leaf that are dangerous or productive of this disease?

A. You mean, the ones that fall on the apple leaf?

[fol. 60] X. Yes, sir.

A. I don't believe I know.

X. Where do they light on the cedar tree and cause it?

A. You mean, the spores that produce the disease?

X. Yes.

A. I don't know whether that has ever been found out or not.

X. Did you ever see one flying through the air?

A. No, sir.

Witness stood aside.

Otto V. Pence, sworn, examined by Judge Tavenner, testified:

Q. What is your occupation, Mr. Pence?

A. Clerk of the Circuit Court of Shenandoah County.

Q. You are also Clerk of the Board of Supervisors, are you?

A. Yes, sir.

Q. Will you please state whether or not the Board of Supervisors approved the cedar rust law for Lee District in this County?

A. They did.

Q. Will you please furnish a copy of that order of the Board of Supervisors, adopting the law for Lee District as a part of your evidence?

A. Yes, sir.

Mr. Dechert: What is the date of its adoption by the Board of Supervisors?

Witness: June 14, 1920.

Memo: Said order is as follows:

"At a regular meeting of the Board of Supervisors for Shenandoah County, held in the Court House, on Monday, June 14, 1920. All members of the Board being present. In re adoption of cedar rust law for Lee District, upon petition of C. B. Pence, and other tax-payers. It was resolved and ordered by the affirmative votes of J. F. Wisman, W. M. Hottel, J. W. Pifer, and George A. Copp, and the negative votes of C. E. Burner and J. W. Carper, being all of [fol. 61] the members of the Board who were present, that an 'Act for the control and eradication of the plant disease, commonly known as "orange" or "cedar rust," in the magisterial districts and counties of this State where said disease is prevalent,' approved March 4, 1914, Chapter 36, page 49 of the Acts of Assembly, 1914, be and the same is hereby accepted and adopted for Lee Magisterial District, subject to the ratification and approval of this action of the Board by the Circuit Court of this County; and the Clerk of this Board is directed to certify a copy of this order to the said court for its consideration."

Q. Will you state whether or not the Circuit Court of this county confirmed the action of the Board of Supervisors and approved the adoption of that law?

A. It did.

Q. Will you also prepare and file a copy of that order of the Circuit Court of Shenandoah County, approving the action of the Board in adopting that law, as a part of your testimony?

A. I will.

Memo.: Said Order of Circuit Court is as follows:

"At a Circuit Court held in and for the County of Shenandoah, Virginia, in the Court House Thereof, at Woodstock, Virginia, on Monday, September 13, 1920

"Present: The Honorable F. B. Whiting, Judge of the Circuit Court of Shenandoah County.

"In the Matter of the Petition of C. E. Pence and Other Tax-payers of Lee District for the Adoption of the Cedar-rust Law for Lee District, Shenandoah County

"It appearing to the Court from a certified copy of the order of the Board of Supervisors that they on the 14th

day of June, 1920, accepted and adopted for Lee District, by recorded vote, the Act entitled 'An Act providing for the control and eradication of the plant disease, commonly known as "orange" or "cedar rust," in the magisterial districts and counties of this State where the disease is prevalent,' approved March 4, 1914, Chapter 36, page 49 of the Acts of Assembly 1914, and that no exception has been taken thereto, it is ordered that said action of said Board of Supervisors be and the same is hereby ratified and confirmed."

[fol. 62] WILLIAM W. GLASS, sworn, examined by Judge Tavenner, testified:

Q. Mr. Glass, where do you reside?

A. Winchester, Virginia.

Q. How long have you resided in Winchester, Mr. Glass?

A. I was born near there and resided there all my life except fifteen years from 1901 to 1916 when I lived in Augusta County.

Q. Have you been interested in the orchard business in Frederick County?

A. Yes, sir; more particularly during the last fifteen years.

Q. Have you always been interested in the handling and storing of apples from the orchards of your county?

A. Yes, sir; I have been employed in purchasing and soliciting apples for market, and inspecting apples for packing and while being packed. That is a part of my business.

Q. Do you remember whether or not a number of years ago you were also owner of a tract of land—you and your sister were owners of a tract of land within the very limits of Winchester, and whether or not the State Entomologist undertook to remove the cedar trees from the tract?

A. Yes, sir. I think the first case that arose under the cedar rust law was that one which affected the property owned by my brothers and sisters and myself in Frederick County, upon which the cedars stood, and which is within the city limits. Those cedars were cut by the Court order after very bitter opposition on the part of the owners of the property, including myself.

Q. At the time you owned the cedar grove did you also own an orchard?

A. Yes, sir; there was an orchard on the same property. We still own the property.

Q. This tract of land you regarded at the time as valuable on account of the cedar trees that were growing on it, did you not?

A. Yes, sir. There were about one hundred acres of rugged land, pasture land, interspersed with a great many cedar trees, and we did set very great store by the cedar trees. We felt that they possessed a very large element of value. For that reason we opposed the cutting of them to the extent of our ability to do so.

Q. The Court allowed nominal compensation for the injury to the land, I believe?

A. Yes, sir.

[fol. 63] Mr. Dechert: That certainly is not a proper inquiry—what compensation the Court allowed him.

Judge Tavenner: I will withdraw the question.

Q. Mr. Glass, what effect did the removal of the cedar trees upon your land have upon the value of the surface of the land?

A. The value of the tract of land, which, as I say, was then and has continuously since then been used for pasturage purposes, was very materially enhanced. The amount of pasturage was very greatly increased by the removal of the cedar trees. I suppose that the pasturage value was enhanced not less than one-third—increasing 33 1-3 per cent, the value as a pasture tract by the removal of the trees.

Q. What was the character of the soil, Mr. Glass?

A. Strong limestone with clay sub-soil.

Q. Good, productive land?

A. Good land—none better. Of course, it was rugged, interspersed with rocks, but very strong land.

Q. Mr. Glass, what have been your opportunities for observing the value of lands in your county and of the Valley?

A. Well, sir, I was born on a farm and I have been connected with farming and orcharding all my life, and particularly in the orchard business. I am a farmer at this time. I have a good many occupations, but that is my

principal one—fruit growing and farming. I have charge of 550 acres in Frederick county—two farms.

Q. You have seen lands from which the cedar trees have been removed, frequently, have you not?

A. Yes, sir.

Q. Will you state if you have observed what is the effect upon the productive value of lands by the removal of cedar trees?

Mr. Dechert: Question is objected to on the ground that the witness has no expert qualifications whatever.

Objection over-ruled, exception for defendant.

Mr. Dechert: You did practice law for a number of years?

Witness: Yes, sir; for fifteen years.

[fol. 64] A. My observation has been that the grass does not thrive under a cedar tree, in fact, it scarcely grows at all. The cedar sheds its foliage and where any number of cedar trees are grouped together there is generally no grass under them; and the removal of the trees, of course, removes that condition; and the land, instead of being bare and unimproved land, becomes pasture land, just as if there had been no trees there.

Q. As a matter of fact, do you recall whether or not the removal of the cedar tree is usually followed quickly by the production of good grass?

A. Well, in the case with which I am best familiar it was very striking. After the removal of the trees, for the remainder of the season there were very bare places on that portion of the land which had been covered with cedars, but the following year the growth of the grass was very luxuriant, and encroached upon the rocks even, and made a veritable mat of pasture, where there had been barren soil with the exception of the cedar trees that were removed.

Q. You have stated that you were also growing an orchard, or developing an orchard, on the Glass tract?

A. Yes, sir.

Q. How near is your orchard to the area that was covered by the cedars?

A. About a quarter of a mile from the edge of it.

Q. What has been your observation, Mr. Glass, of the effect of the cedar tree upon the apple tree?

Mr. Dechert: Objected to because he has absolutely failed to show any qualifications to answer that question. That calls for a matter of expert knowledge.

Objection over-ruled and exception for defendant.

A. Well, it is a matter of common knowledge among orchardists that the cedar tree and the apple tree of certain varieties cannot live side by side or in closs proximity of each other. That is my observation based on many years' experience in the business—that the result is that this cedar rust, as it is commonly called, is so detrimental to the apple trees and the fruit as to destroy any market value that they would have as commercial apples.

Q. In the territory in the vicinity of Frederick County, and in the vicinity of Winchester, or in the great apple [fol. 65] belt of Frederick County, do you know whether the cedar trees have been removed or not?

A. Yes, sir; the cedar trees have been practically all removed. There is a new growth of small cedars from time to time, but there is a regularly organized campaign conducted every year to destroy the little seedlings and prevent a return of the disease. It is practically a dead issue in the fruit growing belt of Frederick County. The cedar rust has been eliminated by the destruction of the red cedars to all practical purposes.

Q. Prior to the elimination of the red cedar in your territory were your trees infected with the disease?

A. They were very seriously infected, and more so some years than in others, but always to a certain extent. It is well known that the character of the infection is largely regulated by the character of the weather. When there was a wet spring the infection would be very great; if it happened to be a dry spring it would not be so bad; but there was always an infection from the cedars.

Q. Are you able to give the Court some idea of the magnitude of the apple industry in this territory of the Valley of Virginia?

A. Well, the commercial apple industry of the Shenandoah Valley—particularly in Frederick County, and to almost as great extent in Shenandoah and in Augusta coun-

ties, and, I suppose, practically, to as great extent in Rockingham County, although not to such an extent in Rockingham as in the other three counties—looms up as its principal agricultural industry; it certainly is such in Frederick County.

Q. You have in Winchester what sort of storage houses or cold storage plants, and other industries, that have been established to take care of the apple crops and their products?

A. We have two cold storage plants erected and conducted exclusively for the storage of apples in Winchester having a combined capacity of about half a million barrels a year. We have a very large canning factory a vinegar plant, and a second one nearly as large. I believe the plant of the National Fruit Products Company, at Winchester, is the largest unit for the handling of by-products from the apple tree that there is in the world. Their product consists of cider and also the canning of apple sauce, the pared apple, and the manufacture of apple butter, vinegar, and jellies, also, I think.

Q. Do those institutions draw for their products from Shenandoah County, also?

A. Yes, sir; they draw apples from a large territory, in some cases going out more than one hundred miles that I know of and having them shipped in.

Q. Do they employ labor, and if so, to what extent?

[fol. 66] A. They have a very large pay-roll; they have a large number of employees, I don't know the number, but I would say not less than two hundred during the season.

Q. Mr. Glass, with the cedar trees in Frederick County left standing, is there any variety of apple that can be said to be immune from cedar rust?

Objection; question withdrawn.

Q. Mr. Glass, from your observation of the apple, and the various kinds of apples, what varieties seem to be the worst affected by cedar rust?

A. According to my observation, the variety that suffers most is the Rome Beauty; next to that, the York Imperial, and then the Ben Davis, and, in a lesser degree, practically every variety, although up to the present time the Winesap group seems to posses rather resistant qualities to the cedar

rust, but they are showing signs of yielding to it, however, as it is now being found that even these varieties are becoming affected.

Q. It was once believed that the Delicious was immune to the disease; do you know, now, how that apple is being affected by the diease?

Mr. Dechert: By your own observation, he is asking you, Mr. Glass.

A. I have no Delicious trees in bearing and I am not able to state from my own observation whether or not the Delicious is susceptible to the cedar rust or not. I do not happen to have noticed that particular variety, not having any in my own orchard.

Q. What varieties in the Valley of Virginia are regarded as the commercial varieties?

A. York Imperial is by all odds the most profitable commercial variety of apple.

Mr. Dechert: That is because of its durability and appearance.

Witness: It is because it possesses attractive qualities both in quality and in appearance, and commands a good market value. It has become the leading apple on the foreign market at this time second only to the Albemarle [fol. 67] Pippin, which is grown only in comparatively small quantities. So that the York Imperial, in the Valley, is the money apple. It always takes the top of the foreign market. It carries well, and is very highly regarded by the English people.

Mr. Dechert: So far as it is marketed at all, it is chiefly marketed abroad?

Witness: Chiefly; yes, sir. I expect ninety per cent. of the York Imperial apples grown in the Valley this year have gone abroad.

Q. As compared with the apples of New York or of Canada, what rank has the York Imperial taken this year?

A. The York Imperial ranks above everything this year from any section of the world.

Q. I mean, the Virginia York Imperial apple?

A. The Virginia York Imperial has outsold every variety on the foreign market except the Albemarle Pippin, and

that has come about in an interesting way. The New York Baldwin formerly commanded a higher market price in England, but for several years, now, the York Imperial has taken a position far in advance of the New York Baldwin apple. The York Imperial also commands a very good price on the New York City market. It is used extensively in New York City and commands very much the same price on the New York market that it does in the foreign market, second only to the Albemarle Pippin there.

Q. You have said that it was a matter of common knowledge that you cannot produce a certain variety, or certain varieties, of apples, in close proximity to the cedar tree; is it a difficult matter for a novice to discover the appearance of cedar rust on the apple?

A. There is no difficulty at all to discover the presence of cedar rust. Of course, I would not undertake to claim that a novice could identify it unless he had instructions from a scientist, but after it has once been discovered it is a very simple matter to observe it.

Q. Would you or any other orchard man have any trouble in discovering the presence of the disease on the apple leaves?

A. We would have no trouble. It is very pathetically apparent when it is there. It is there to be observed without argument.

Q. And on the Rome Beauty apply you can see it as far as you can see the apple, can you not?

[fol. 68] A. Yes, sir; as far as you can see the apple.

Q. Have you had opportunity to view the premises known as the Julia V. Miller property?

A. No, sir; I have not. I have been past the property at least many times, but I am not familiar with it; in fact, I never looked at it with this point in view at all, so I do not know anything about it from the standpoint of the cedar trees.

Q. Do you know whether the lands in the New Market territory are similar in type or character to those which you have described in your county?

A. Yes, sir; I know that the land in that neighborhood is very good land, inded, and it is adapted to orchard purposes. It produces good orchards. I have been in the orchards there many times and know of their general char-

acter, and I would not hesitate to say that it is good orchard land for commercial orchards.

Q. Now, what is the effect upon the market value of lands in a community, especially orchard lands, where the cedar trees have been removed?

A. The land would certainly command a very much higher value where there were no cedars than it would command if the cedars had not been removed.

Fred L. Glaize, sworn, examined by Judge Tavenner, testified:

Q. Mr. Glaize, where do you live?

A. Winchester, Virginia.

Q. You are connected with what is known as the Mt. Clinton Orchard Company, are you not?

A. Yes, sir.

Q. What is its correct name?

A. Mt. Clinton Orchards, Incorporated.

Q. Where are the orchards located?

A. In Shenandoah County, in Lee District, about seven miles west of Mt. Jackson.

Q. How many acres in it?

A. Three hundred and fifty-two acres in the place, and 315 acres in bearing apple trees.

Q. What varieties?

A. York Imperial is the principal variety. I would say fifty per cent. of the bearing trees are York Imperials. The next variety would be Ben Davis.

[fol. 69] Q. Has your orchard arrived at the bearing age?

A. Some of the trees are seventeen years old—fifty per cent. are seventeen years old of the 315 acres which are in bearing. Some of the acreage is 12 or 13 years old. Fifty acres are in trees thirteen and fourteen years old.

Q. You can give some idea, in a general way, of the production of your orchard in the last year or two, can you?

A. Yes, sir. In 1923 we packed 12,000 barrels of apples; in 1924, we packed 12,600 barrels; in 1925 we packed 15,000 barrels; and that was in addition to the bulk stock and cider stock.

Q. Are you acquainted with what is known as the cedar rust disease, know it when you see it on the leaf and on the apple?

A. Yes, sir.

Q. Have you undertaken a campaign against the red cedar tree in your territory?

A. In 1923 we realized that something had to be done to save the production of our York Imperial apples. Prior to that time we had been unable to barrel any of the York Imperials on account of their size. We were told that the only way to bring our York Imperial production to a commercial condition would be to cut the cedar trees in the neighborhood and that this would cost us considerable money, but we determined to spend this money in an effort to save our apples.

Mr. Dechert: I do not like to interrupt the witness, but had he not better confine himself to stating facts and not hearsay and argument?

The Court: The witness should state what he knows.

Q. As the result of your cutting of the cedars, what happened? Did you cut the cedars from your territory?

A. In 1923 we spent between three and four thousand dollars in cutting cedar trees within a radius of one to three miles of the orchard.

Q. Prior to that cedar cutting, what was the appearance of your foliage and of your apples and to what was that due?

Mr. Dechert: Question is objected to. The latter part of the question calls for expert testimony from a witness who has not shown himself qualified to testify as such.

Objection over-ruled, exception for defendant.

[fol. 70] A. All that I can say is that prior to the cutting of the cedars we failed to have any York Imperial apples for any commercial purpose, but in the subsequent year, after the cutting of the cedars, we barreled 6,000 York Imperials, and in 1924 we barreled 6,500 apples. We cut the cedars in the winter of 1923, and following that we had 6,000 barrels of apples, and in 1924, we packed 6,500 barrels of York Imperials. In 1925 we packed 8,500 barrels of York Imperials.

Q. Could you observe before 1923, I am speaking of your own observation, from the foliage and fruit, what was the trouble with your York Imperial variety of apples?

Objection, over-ruled, exception for defendant.

A. I would say any one would be blind who could not see the infestation on the leaves of the York Imperial trees, especially.

Q. What was the appearance of this infestation or infection upon the York Imperial trees after the removal of the cedars in the early part of 1923?

A. The infestation was very limited.

Mr. Dechert: Do you mean the removal of the cedars was in the first part of the year or the latter part of the year 1923?

Witness: In February and March of 1923 is when we first cut the cedars.

Q. Will you tell the Court whether or not in your territory it is practicable to raise fruit in close proximity to the cedar trees?

A. We tried it, but did not succeed until we cut the cedars. That is the only evidence that I know.

Q. Now, you have explained to us your own enterprise, what other orchard enterprises are there in that territory?

A. The largest in that territory is the Turkey Knob orchard.

Q. About how many acres is in that?

A. 600 acres, so I am told.

Q. Your orchard is located about how far, do you think, from the Julia V. Miller land?

A. I am not familiar with the Miller land.

Q. How far are you from New Market?

[fol. 71] A. I am not able to say.

Q. In a direct line from New Market?

Mr. Dechert: He says seven miles from there.

Q. Have you an idea about how far it is?

A. I would say that would be about nine miles.

Q. There are other orchards, I presume, that you know of—the Byrd orchard, the Turkey Knob, and the Strathmore, near Timberville?

A. The Mt. Clifton orchard is the only orchard that I am interested in.

Q. Those other orchards are in existence there and doing business?

A. Yes, sir.

Q. In other words, that is an orchard territory?

A. Absolutely.

Q. Does the apple industry employ many employes in your community?

A. You mean, during apple picking season, or the whole year?

Q. Through the whole year, apple picking and otherwise?

A. Yes, sir.

Q. Now, Mr. Glaize, have you observed the effect upon the soil of the removal of the cedar tree, whether the soil is injured by reason of the removal in its value as pasture land or purposes of cultivation?

A. I have not.

Q. You have paid no attention to that?

A. No, sir. Cedars were not on our land and I was not interested in that phase of it.

Witness stood aside.

H. Clay de Grange, sworn, examined by Judge Tavenner, testified:

Q. Mr. de Grange, what is your occupation?

A. Orchardist and farmer.

Q. How long have you been engaged in these businesses?

A. Since 1917.

Mr. Dechert: What were you before that?

[fol. 72] Witness: I was in the commercial world, outside of that.

Q. What is the extent of you orchard holdings?

A. I have a hundred acres in orchard.

Q. Have you been connected with any orchard enterprise or orchard association in this county?

A. I have been connected with the Frederick County Fruit Growers Association.

Q. Where do you live?

A. Winchester.

Q. Have you ever had an opportunity to observe the effect of cedar rust upon the apple orchards?

A. I think so; yes, sir.

Q. Give the Court some idea of the extent of your observation?

Mr. Dechert: Not of the result, but, first, of your opportunities.

A. My opportunity, of course, has been occasioned by my being in the business since 1917. Perhaps the most striking example of it that I have had was the complete loss in one orchard, which had produced as many as 3,000 barrels of apples in other years, which loss was directly due to cedar rust on the foliage or on the apple

Mr. Dechert: Where was that orchard?

Witness: That orchard is approximately 4 miles from Winchester.

Mr. Dechert: They have cut all cedar trees in Frederick County.

Witness: That was in the year 1918, I think.

Q. The cedar trees were then removed, were they?

A. There has been continuous activity in the removal of cedar trees ever since I have been up there, we are still doing it. We have some small infection there yet. We have cedar trees to the east of us, and if we have an east wind in moist weather, we are liable to get the infection. [fol. 73] Q. Will you tell the Court whether or not it is practicable to raise fruit trees, apple trees, I mean, in close proximity to cedar trees?

A. I don't think it is. That would be my personal idea. If I wanted to buy an orchard, I would not want it where there were cedar trees. I might have 17 years ago, but not now.

Q. You mean to say that you would not be interested in an orchard proposition if you knew cedar trees were in existence around it or if they were that could not be destroyed.

A. No, sir; I would not be at any price.

Q. Have you observed, as a farmer, the effect upon the soil of the removal of the cedar trees, or not?

A. No, I have not. I am not like Mr. Glass, I have not had any cedars on my place particularly to observe that.

Q. Have you had any opportunity to observe this Julia V. Miller land and the cedars?

A. No, sir; I have not.

Q. Are you acquainted with the extent of the apple orchard industry in the valley?

A. I am in a general way. I know it is quite large. It is probably the most important farming industry we have in Frederick County, so far as revenue is concerned.

Mr. Dechert: Where did you come from, sir?

A. I was born in Maryland.

Witness stood aside.

Will Hiett, sworn, examined by Judge Tavenner, testified:

Q. Where do you live?

A. The edge of Winchester.

Q. I was going to say that we were boys together, or pretty near boys together?

A. You are a little older than I am.

Q. What is your occupation, and what has it been in years gone by?

A. Farming until I went into the fruit business. Have been in that a long while.

[fol. 74] Q. You have been farming for 35 or 40 years, have you not?

A. Forty years.

Q. Where do your lands lie?

A. Five miles north of Winchester.

Q. On Apple Pie Ridge?

A. That is where I was born and raised.

Q. As a farmer you own and handle about how many acres of land?

A. We have in one place about 360 acres, and about 265 acres in orchard; and then we have an orchard on my home place of 25 acres.

Q. I would like for you to tell the court whether you have observed the cedar rust disease on the apple and the foliage in your own orchard in years past?

A. Oh, yes, sir, years back. The first orchard I started was 36 or 37 years ago, and at that time when they got the cedar rust we did not know what caused it. The trees turned black and the apples brown and would be little. Finally, we found that it was cedar rust, and we organized and cut down the cedars around the orchards and the cedar rust disappeared and we got better apples. We kept cutting them farther and farther back from the orchards and we are not bothered now with cedar rust.

Q. There is practically no injury from cedars in your orchard at all?

A. No, sir.

Q. How many acres have you in orchard?

A. 265 or 270 acres.

Q. What varieties of apples?

A. Mostly York Imperial and Ben Davis.

Q. Varieties that are affected by this disease?

A. Yes, sir.

Q. What varieties are the best marketable varieties in your community?

A. York Imperial are our money makers.

Q. You are an exporter, are you?

A. Export sometimes.

Q. As a matter of fact, would it be practical to raise in your territory apples in close proximity to cedar trees?

A. No, sir. I wouldn't have an orchard and wouldn't buy an orchard close to cedars, that is, where I could not have them cut down.

Q. In other words, in your judgment an orchard is not worth as much as the land itself with the trees standing on it?

A. I wouldn't buy land unless it was orchard land, and it [fol. 75] could not be orchard land. Naturally, apples will pay better than anything else you can put on your land. That is the way I feel about it.

Q. In your farming operations you have come in contact, have you not, with red cedars on pasture and on farming land?

A. Yes, sir. Although we did not have a great many on our place. They were around us on the mountains, a mile and a half away from the orchard.

Q. What observation have you made, if any, as to the additional value of cedar trees to farming and grazing land?

A. It was more noticeable on Mr. Glass' land close to Winchester. We had to fight them, we fruit growers, because their cedars had a sentimental value and they did not want to get rid of them. And there were a lot of them in there, and they used it for pasture. They had a lot of big cedars around the house and all through the field. If you go by there now, there are plenty of other kind of trees for shade. It looks like there is grass all over the place now. Where cedar trees grow there is no grass and nothing will grow.

Q. Grass will grow under walnut and under hickory trees and under locust?

A. Yes, sir; but under a cedar the shade is so great that the grass will not grow there. They make the land thin, and you hardly ever see grass right around cedars.

Q. As I understand you, you have been farming, and that was your main occupation as you grew to manhood?

A. Yes, sir.

Q. Will you state whether or not cedar trees add value to real estate as pasture or farming land?

A. We do not have many cedars on our place.

Q. Good farmers won't keep them?

A. Well, I don't like them. I do not think they are much value. They are not much value for posts—very little.

Mr. Dechert: I suppose they are no good for Christmas trees?

Witness: Oh, you can use them for Christmas trees. They are all right for that.

Mr. Dechert: You would like to see plenty of them used, wouldn't you?

Witness: Yes, sir.

[fol. 76] Witness stood aside.

JOHN C. CATHER, sworn, examined by Judge Tavenner, testified:

Q. Where do you live, Mr. Cather?

A. Winchester.

Q. What is your occupation?

A. Farming and fruit growing.

Q. You are engaged as a farmer and an orchardist?

A. Yes, sir.

Q. Where do your lands lie?

A. About three and a half miles west of Winchester.

Q. On what may be said to be the Apple Pie Ridge?

A. No, sir; my place is not in the Apple Pie territory, it is more to the west. I am superintendent of the Round Hill orchards. They have an orchard at Round Hill and one at Berryville.

Mr. Dechert: Where is Round Hill?

Witness: That is a local name. It is four miles west of Winchester.

Q. You have charge, then, in a way of a considerable acreage?

A. 440 acres in my own place; and 312 in one tract of Round Hill orchards, and 100 acres in another tract.

Q. You are engaged, then, in both farming and orcharding?

A. Yes, sir.

Q. I want you to state whether or not you are acquainted with the cedar rust disease?

A. Yes, sir; I think I am very familiar with it.

Q. How has it affected the orchards that you are interested in?

A. The farm that I own now is one of the places that there was quite a little objection to cutting the cedars, and the cedars practically ruined my crop. I may have had two or three barrels of Ben Davis apples on this farm before I got the place. Since I got the place, of course, I cut the cedars, and the apples have come all right. The next crop of apples was all right. Of course, I have seen these other cases that have been spoken of heretofore, the Glass case and in Clarke County.

[fol. 77] Q. As a matter of common knowledge, what has been the result of cedar cutting in your territory?

A. The cedar cutting in Frederick County has practically eradicated the disease.

Q. Were the red cedar trees standing in Frederick County could the orchard industry be conducted profitably?

A. No, sir; I don't think so.

Q. You have stated that you are an orchardist; I want to ask you whether or not you have been largely interested in farming operations?

A. I only have 75 acres in orchard on my own place, the rest of it is devoted to raising crops and life-stock.

Q. Have you observed what the effect has been on land for agricultural purposes and grazing purposes with the removal of the cedar trees from the land?

A. Yes. We had quite a few cedar trees on the land we used to have for grazing, and after we cut those cedar trees and plowed, the grass came where the trees had stood, and we did not have grass there prior to that time—prior to the cutting.

Q. State what is the effect of the cedar tree upon the pasture in the immediate vicinity of the cedar tree?

A. Grass does not grow under cedar trees.

Q. What abqut the production of crops close to cedar trees?

A. We had no cedars where we were farming, so I would not be able to say about that.

Q. They were eliminated long ago?

A. Yes, sir.

Q. Are you acquainted with the Julia V. Miller cedar tract?

A. No, I am not. I suppose I have seen it. I know I have seen it as I would go up and down the road, but I never looked at it with that in view.

Q. You spoke of the York Imperial apple being infected, do you know whether any other varieties are affected by cedar rust?

A. I had some experience with the Ben Davis outside of the York, and they are very easily infected.

Q. Can these varieties of apples be raised profitable in the vicinity of cedars?

A. No, sir; I say not.

Q. What would be the ordinary value of orchard property with cedar trees in the vicinity if the cedars could not be removed?

A. I do not think you could sell an orchard up in our county close to cedar trees, if the cedars could not be removed.

[fol. 78] Q. Your land is of what character?

A. Heavy limestone with clay sub-soil.

Q. Regular old Valley limestone?

A. Yes, sir.

Witness stood aside.

SCOTT GRANT, sworn, examined by Judge Tavenner, testified:

Q. Mr. Grant, where do you live?

A. Frederick County.

Q. What business are you engaged in?

A. Farming and apple grower and stock growing.

Q. You own an orchard in Frederick and Shenandoah counties, do you not?

A. Yes, sir.

Q. What is the extent of your orchard holdings in Frederick County?

A. About 300 acres.

Q. How many farming lands do you possess?

A. I have six places—about 1,200 acres.

Q. That is composed of general farming land, is it?

A. Yes, sir.

Q. What have you in this county?

A. Forty-two acres.

Q. That is exclusively orchard, is it not?

A. Yes, sir.

Q. Where does it lie?

A. In Shenandoah County, Lee District, about a mile northwest of New Market station.

Q. About a mile northwest of the station?

A. Yes, sir.

Q. Have the cedar trees been removed from the immediate vicinity of your orchard near Clearbrook?

A. Most of them have been cut between there and New Market, yet there are some few—a good many—left.

Q. Now, you are about how far from the Julia V. Miller cedars, do you know, in a straight line?

A. I suppose, from two to two and a half miles.

Q. In what direction do the winds come that affect you most seriously?

[fol. 79] Objection; withdrawn.

Q. What direction is the Julia V. Miller tract of land from your orchard?

A. It is southeast, I suppose.

Q. Do you know whether you have been affected with cedar rust in your Clearbrook orchard?

A. Yes, sir.

Q. To what extent?

A. Ruined several crops.

Q. Have you been able, up until recently, to produce any York Imperial apples in your orchard?

A. Not to the full extent until the last couple of years. We had been getting from eight hundred to one thousand barrels; the last two years I packed twenty-four to twenty-six hundred barrels. This last year we packed 2,460 number ones, outside of the cider and bulk apples.

Q. Are you still affected by cedar rust troubles?

A. Some little.

Q. You haven't got rid of all the cedars?

A. No, sir.

Q. Mr. Grant, what other orchards are in your community?

A. The Turkey Knob orchard this side of there; Mr. Glaize's orchard at Mt. Clifton, and Mr. Byrd's orchard, and there are several little orchards around there.

Q. The Strathmore?

A. Yes, sir. Mr. Doll has one at Quicksburg.

Q. From your observation, have you been able to ascertain whether you can produce York Imperial and Ben Davis apples in close proximity to red cedars?

A. We cannot do much with them where there are cedars. We were the first persons in Frederick County to adopt the law for cutting cedars.

Q. You were the first?

A. Yes, sir. I have been on the Board of Supervisors for about fourteen years, and I was the first one to adopt it in our district—Apple Pie Ridge. We have cut all cedars in that district, now, except back on Cedar Ridge.

Q. What has been the effect of cutting the cedars upon your orchards?

A. Why, it has improved them very much.

Q. Are you disturbed in your territory now with the disease of cedar rust to any appreciable extent?

[fol. 80] A. Some few places there are some cedars. Last year we just finished cutting in some territories.

Q. Now, you have said that you are not only an orchard man but that you are a farmer; I will ask you what is the effect of the removal of the cedars from farming land? What is the effect of the removal of the cedar trees upon the land itself?

A. For farming or pasture?

Q. Either.

A. Grass will not grow under cedar trees and shaded grass has no value for pasture.

Q. How many head of cattle do you handle each year usually?

A. I can't answer that. I keep from 150 to 200; that is, buying and selling all the time.

Q. You have stated your observation as to the effect of cedar trees upon grass land——

A. (Interposing.) I would not rent shaded pasture.

Q. You speak of shaded pasture; is there any difference between the shaded pasture under locust and walnut trees and under cedar trees?

A. Well, cedars have stickers and the grass will not grow under that, and cattle won't eat it any way.

Q. On account of the stickers?

A. Yes, sir.

Q. They call those stickers or leaves of the cedars "needles," don't they, generally?

A. I don't know what they call them. Cattle will not graze under them.

Q. What has been your observation of the effect upon land by the removal of the cedar trees from it?

A. For pasture, it will help it.

Q. You mean that grass will come where the cedar trees have been cut?

A. Oh, yes.

Q. You say, grass will not grow under cedars?

A. It will not.

Q. After you remove the cedars, what effect does that have upon the land?

A. It will run in blue grass if it is a blue grass section.

Q. Is it the custom of farmers to allow cedar trees to stand on their farming land?

A. Some farmers have them.

Q. Do they farm the land under cedar trees, and will the land under cedar trees produce crops?

[fol. 81] A. They will not.

Cross-examination.

By Mr. Dechert:

X. How far is that Byrd orchard from these trees on Mrs. Julia V. Miller's land?

A. I just can't answer that.

X. Something like five or six miles, isn't it?

A. I would think so.

Witness stood aside.

A. B. Bushong, sworn, examined by Judge Tavenner, testified:

Q. Where do you live, Mr. Bushong?

A. New Market, Virginia.

Q. How far do you live from Mrs. Julia V. Miller's tract of land?

A. Two miles and a half, I think.

Q. Have you an orchard?

A. A small one; yes, sir.

Q. What varieties of apples?

A. Principally Yorks, Black Twig, and Bens.

Q. Have you suffered loss from cedar rust disease as you know it.

A. I am not growing any apples. I don't know whether it is cedar rust or not. I am not acquainted with the disease. I don't know it.

Q. How does it affect your trees?

A. The foliage on the trees turns yellow like the first of August and the apples quit growing and I get no apples.

Q. You get no results.

A. None.

Q. Do you know other orchards in your vicinity that are affected the same way at the present?

A. The Driver orchard is the nearest to the cedars that I know of.

Q. Have you see- what is the appearance of the Driver orchard?

A. The leaves on the trees turn yellow.

[fol. 82] Mr. Dechert: How far is the Driver orchard from the Miller cedars?

Witness: I don't know. I never measured. I would think, a mile or a mile and a half.

Q. What direction is the Driver orchard from these Miller cedars?

A. South. That is the way I would call it.

By Mr. Dechert:

X. Are there some woods between the Miller place and the Driver orchard?

A. I think, possibly, there are. I don't know for sure about that.

X. You think, possibly, there are?

A. Yes, sir.

Witness stood aside.

Frank Driver, sworn, examined by Judge Tavenner, testified:

Q. Mr. Driver, where do you live?

A. Timberville.

Q. What is your occupation?

A. Farmer and fruit grower and cattle dealer.

Q. You are a member of the firm of C. Driver?

A. Yes, sir.

Q. You are a son of C. Driver, aren't you?

A. Yes, sir.

Q. To what extent are you engaged in farming and orcharding?

A. I have about 75 acres in orchard.

Q. What interest have you in farming lands?

A. About 1,200 acres farming and grazing land.

Q. A portion of your holdings are in this county, are they not, or near the line?

A. Near the line.

Q. What have you there?

A. I have some grazing land, an orchard, and some farming land.

[fol. 83] Q. Now, Mr. Driver, you say you are not only an orchardist and general farmer, but you are engaged in the stock business; to what extent are you engaged in the stock-raising business?

A. We graze and feed a good many cattle, and handle cattle on commission in Baltimore.

Q. About how many cattle do you usually handle on your farm a year.

A. Well, the cattle we feed and graze, I guess, are around eight hundred to a thousand a year.

Q. Mr. Driver, what has been your observation as to the effect of the cedar tree upon grazing land?

A. Where the land is shaded by cedar trees the grass—there is not much grass grows under cedar trees.

Q. What grass does grow there, is it of real value?

A. I wouldn't think so. Not of much value.

Q. As a farmer, would you encourage the growth of cedar trees in your pasture land?

A. No, sir.

Q. Do you allow them to grow there?

A. No, sir.

Q. Now what you have said about the effect of cedar trees upon grazing land, does that apply likewise to your agricultural land and farming land?

A. We never formed any land that had cedar trees growing on it. The cedars we had were on our grazing land.

Q. Won't they grow on agricultural land?

A. I suppose they would; yes, sir.

Q. Why aren't they there?

A. I don't know. I suppose they have been cut down.

Q. In other words, would you allow cedar trees to grow on land you cultivate in the usual crops?

A. No, sir.

Q. Now, I am going to ask you whether or not as a fruit grower you have sustained any losses by reason of injury to your orchard from cedar rust?

A. Yes, sir.

Q. I want to direct your attention for a short time to your orchard which lies near the Miller cedars; what have you observed there as to the effect of cedar rust disease upon your orchard?

A. We haven't had any crop there to amount to anything, nothing but little apples for the last six or eight years.

Q. How far is your orchard from the source of infection, the Miller cedar trees?

[fol. 84] A. I would think around a mile. I never measured it.

Q. What direction is your orchard from the cedar trees?

A. South.

Q. About south?

A. Yes, sir.

Q. As an orchardist, do you know the cedar rust disease when you see it?

A. Yes, sir.

Q. Will you tell the Court whether or not your orchard has been affected by the cedar rust disease?

A. Yes, sir.

Q. To what extent?

A. To the extent of practically ruining the crop?

Q. You have how many acres in orchard?

A. Twenty to twenty-one acres in that orchard.

Q. About how far are your other orchards from the Miller cedars?

A. They are probably eight or ten miles. They are beyond Timberville.

Q. What varieties of apples have you in your New Market orchard?

A. They are mostly York and Den Davis.

Q. Are they commercial varieties?

A. Yes, sir.

Q. What is the size and age of the trees?

A. I think the trees are about 18 years old.

Q. Was that orchard planted on land susceptible otherwise for the growing of fruit?

A. I think so. We planted it.

Q. Do you believe it is now?

A. Yes, sir.

Q. With the cedar trees in the vicinity of this orchard what is the value of your orchard land, if they cannot be removed?

A. That particular orchard?

Q. Yes.

A. It is not producing worth anything now at all.

Q. It has no real value as an orchard?

A. As an orchard it has no value at all. It didn't bring enough to pay expenses.

Q. Is the land in that territory and in the vicinity of the Miller cedars suitable for orchard purposes, if the cedar trees were removed?

[fol. 85] A. Some of it is; yes, sir.

Q. That is orchard territory, is it not?

A. Yes, sir.

Q. Now you have stated, I believe, that the foliage is affected; give the Court some idea how serious that infection was?

A. The affection of the foliage or the crop?

Q. Both.

A. Well, it ruined the crop to the extent that there were practically no apples worth bearing; that is, the York Imperials and the Ben Davis.

Q. Tell the Court how your orchard was in August, how it looked to the eye?

A. The leaves were full of cedar rust and turned yellow, and a great many of them fell off.

Q. When the leaves turned yellow and fell off the trees failed to develop the fruit?

A. Yes, sir.

Q. Are you acquainted with the Julia V. Miller tract of land?

A. Yes, sir.

Q. You have stated the immediate effect, I believe, of the cedar tree upon pasture land, and its effect upon land used for agriculture; now, will you please state what would be the effect upon the productive value of the Julia V. Miller tract if the cedars were removed?

A. I think it would produce more pasture.

Q. And where they are located on other agricultural land and along fences, would the removal of those cedars affect its productive value?

A. I think it would.

Q. Advantageously?

A. I think the crop would grow better if not shaded by cedar trees.

Q. I will ask you whether or not if those cedar trees on that property are cut reasonably close to the ground, and with proper care and attention, what injury would be done to the tract of land by reason of the cutting and removal of the cedars?

A. I don't consider that it would be any injury. I would consider it would be an advantage.

Q. Will you please state about what is the distance of the Julia V. Miller cedars from other orchard tracts, large or small, in the immediate vicinity of the property?

A. I would say it is about two miles from the orchard over against the mountain of Walden Brothers. I wouldn't think it would be over a mile to the Hottle orchard that has been mentioned here.

[fol. 86] Q. Are there any other small orchards?

A. The Bushong orchard below New Market.

Q. I will ask you this; from your observation, is it profitable to the person grazing stock to admit the growth or existence of cedars upon their grazing lands?

A. I don't think just a few cedars scattered around would affect the grazing land to any extent, but if they are very thick I don't think it would be profitable.

Q. Are they of any value?

A. I don't think they would be any advantage. They might be some little advantage, if there were no other shade trees; though I have seen cattle do as well in fields where there was no shade as where there was.

Cross-examination.

By Mr. Dechert:

X. Your orchards are surrounded on the west and north by timber-lands, aren't they?

A. You mean this particular orchard?

X. Yes, sir.

A. Sorrounded on the west by timber.

X. But not on the north?

A. Well, yes, partly. I would say it is timber brush. I guess you would consider it timber. It was cut over, part of it, once near the orchard. Along one side, to the north end of the orchard, was cut off once, but it has grown up.

X. In timber?

A. Yes, sir; and a little further on there is timber on that side, too.

X. And that is between your orchard and this land of Mrs. Julia V. Miller's?

A. Yes, sir. It is a little bit further west, though, that the Miller cedars.

X. I understood you to say that your orchard is south of the Miller place?

A. That is right.

X. It is a little southwest, isn't it?

A. Possibly so.

X. The prevailing winds in that section are from the west, aren't they?

[fol. 87] A. I don't know about that. They may be.

Witness stood aside.

W. E. Cather, sworn, examined by Judge Tavenner, testified:

Q. Mr. Cather, where do you reside?

A. Close to Winchester, Virginia.

Q. What is your occupation?

A. I am engaged in farming and fruit growing.

Q. Have you an orchard in Shenandoah county?

A. I have.

Q. About how many acres?

A. One hundred and eighty acres.

Q. You are interested, also, in the orchard business in Frederick County?

A. I have an orchard in Clarke County about seven miles east of Winchester.

Q. Have you experienced any difficulty from the cedar rust disease?

A. I have.

Q. Where?

A. In the orchard I formerly owned in Frederick County close to Winchester. The infection and infestation was rather severe one or two years. After they put on a cedar cutting campaign and eradicated the cedars from the immediate vicinity of this orchard, I was not bothered after that with anything but a very slight infestation of cedar rust.

Q. Have you had any trouble in your orchard in Shenandoah County from the same cause?

A. Yes, sir; there is a block there that has shown considerable injury from cedar rust.

Q. Where does your orchard lie?

A. About two miles south of Mt. Jackson.

Q. You made your purchase of orchard property in the Mt. Jackson territory in recent years?

A. In 1920.

Q. I want you to state to the Court something of the orchard enterprises in the southern end of this county, including your own, what orchards are there?

[fol. 88] A. There are a number of very large orchards there and it has very fine apple soil. The Turkey Knob orchard joins me on two sides, with about 600 acres; the Jones tract, which was formerly owned by Whissler, is on the east, and that is about 140 acres; and the Shenandoah Caverns orchard is on the south, and I think has about 60 acres. Three miles southwest is the Mt. Clinton, and the Glaize and the Claybrook; and about two miles south is the Doll orchard, and some little ways further close to Timberville is the Byrd orchard, and some of the others that I am not familiar with.

Q. In other words, the territory in the southern end of Shenandoah County is adapted to fruit growing, you think?

A. It has a very excellent fruit soil.

Q. Now, do you know something from the production from the orchards in that territory in the past few years?

A. The orchards have shown an inclination to bear very heavily over the past few years. They have had very good crops where the cedar rust did not injure them, or frost to injure them.

Q. From your observation and experience, will you tell the Court whether or not it is practicable to raise apples in close proximity to cedar trees?

A. I am thoroughly convinced that the apple and the cedar cannot exist in the same immediate vicinity; one or the other must go; if the cedar is not eradicated the apple tree will be eventually killed.

Q. If the cedar trees are permitted to grow in the apple tree territory is it a practical question to grow apples?

A. It is not.

Q. When you speak of large crops of apples, can you tell the Court a little more definitely about the production of apples in that teritory? How many cars of apples have been shipped out?

A. Shipments from Mt. Jackson have amounted to several hundred carloads a season.

Q. What is the effect upon the value of lands by the removal of the cedar trees in your territory, do you know?

Mr. Dechert: What kind of land?

Judge Tavenner: Orchard lands.

A. Land that is adapted to the growing of orchards would be enhanced in value by the removal of the cedars, because any experienced orchardist would not buy land for the development of an orchard where he knew the cedars were permitted to grow.

[fol. 89] Q. Are you acquainted with the Julia V. Miller cedars?

A. I am not.

Q. Some question has been raised about the prevailing direction of the winds; are the winds in that territory confined to any one direction, especially?

A. They are not. They blow from all points of the compass. Sometimes we have winds from the south, very high winds, running over a period of three or four days. We notice that because in spraying apples we have to spray with the wind; we can't spray against it.

Cross-examination.

By Mr. Dechert:

X. But the prevailing winds are from the west, south, and southwest, aren't they?

A. My impression was that the prevailing winds were from the north and west, with perhaps the south wind next. The east wind is the rarest of all.

X. How far are those orchards you have named as existing in the southern section of this county from the Julia V. Miller place?

A. I do not know where the Miller property is located. My own orchard is about four miles, air-line, from New Market.

X. Which direction from New Market?

A. North.

X. This farm lies about a mile south of New Market, on the Valley pike.

A. Then it is five miles to my place.

X. How far is the Miller tract, then, from the Mt. Clinton orchard?

A. The Mt. Clinton orchard is further south than mine and further west, but I should judge about the same distance from the location of the cedars—five miles.

Redirect examination.

By Judge Tavenner:

Q. About how far is the Strathmore orchard, on a straight line, from New Market?

A. It is about the same distance it is across the tract [fol. 90] from me. The tract, in fact, is just across the fence, and is separated by a county road. There is 1,200 acres in a solid block in this place, and all producing *truid* land.

Witness stood aside.

FRANK DRIVER, recalled by Judge Tavenner, further testified:

Q. Mr. Driver, you spoke something about having an orchard on the other side of Timberville?

A. Yes, sir.

Q. How many acres in it?

A. There is 170—no—about 150 acres in the di-erent tracts.

Q. Have you had any cedar rust trouble in that orchard?

A. I did several years ago.

Q. What sort of trouble was it?

A. Pretty serious trouble then with the crops; they were practically worth nothing.

Q. Have you cut the cedars away from around there?

A. Been cutting cedars for the last five, six, or seven years.

Q. With what result?

A. I had a very good crop, a crop of almost perfect Yorks in 1924, and two years before we cut the cedars they were just little green apples, worth nothing.

Witness stood aside.

C. C. Bowman, sworn, examined by Judge Tavenner, testified:

Q. What is your full name?

A. Charles C. Bowman.

Q. Where do you live, Mr. Bowman?

A. Mt. Jackson.

Q. What is your occupation?

A. Fruit grower.

Q. To what extent are you interested in growing apples?

A. About 300 acres of orchard, most of it full-bearing.

Q. Were your orchards infected by the cedar rust disease in years past?

[fol. 91] A. Yes, sir. Before we cut them down, we were.

Q. To what extent?

A. They were so badly infected we could hardly raise any apples fit to pack. We could raise plenty of apples, but they were so small that it wouldn't pay to grow them. I have counted them a-ready. One time I counted as many as 500 apples to a tree, but they were too little to pick and grade. We could put them all in a little picking crate that holds about a bushel, in which we convey the apples from the orchard to the packing house.

Q. After the red cedars in your territory had been removed from the vicinity of the orchards, what was the result on the orchards?

A. As soon as we removed the cedar trees, the next or following year the fruit was considerably better, and it continued to increase and get better since that time.

Q. The removal of the cedars has continued, has it?

A. Yes, sir; we have kept the little ones cut since that.

Q. Now, Mr. Bowman, have you had opportunity to visit the land of Mrs. Julia V. Miller?

A. Yes, sir.

Q. What have you to say as to the quantity of cedars existing on that land?

A. There are a great many cedars, and they are mature cedars. They are large enough to make posts, and larger, while a great many of them are small ones, too.

Q. Now, what will be the effect upon the productive value of the land with the removal of those cedar trees?

A. I would rather have the land with the cedars off than with them on there.

Q. Why do you say that?

A. It would be worth more.

Q. It would produce more, you mean?

A. Produce more.

Q. In the event that these cedars are cut close to the ground, say, six inches from the ground, and the cedar trees trimmed closely and to a size nor larger than two inches at the small end, and the limbs trimmed to a size not greater than two inches at the small end, and the brush piled and burned, and the work all done with reasonable care, what injury or damage do you think Mrs. Miller would sustain by reason of the cutting of the cedars, she of course to have the wood and the cedar timber or lumber?

A. I couldn't see that she would have any, if the work was properly done. The greatest damage that I could see would be done would be the damage to the land, if the land [fol. 92] would be wet, in getting the brush together and the logs. A good many of the trees are along the woods. I always burned the cedars when I cut them along the road in the road by permission of the Road Board, and I burnt considerable of them, too.

Q. When did you observe this tract of Mrs. Miller's?

A. I saw it yesterday.

Q. Did you observe whether those cedar trees contained cedar balls?

A. They did.

Q. Did you observe whether or not there are any orchard tracts of land near those cedars?

A. I know the Driver orchard. I know it is there. I didn't see it yesterday from where I was, but I know it is there, or had been there.

Q. Do you know red cedars when you see them?
A. Yes, sir.
Q. Those were red cedars?
A. Red cedars.
Q. Did you see any cedar trees that contained cedar balls?
A. All those that I noticed had cedar balls on them, the large trees; and possible some of the small trees did not.

Cross-examination.

By Mr. Dechert:

X. What portion of the trees did you see?
A. I walked through. I drove through the drive-way and walked through the property.
X. Do I understand that all the trees you saw had cedar balls on them?
A. All that I examined for did.
X. How many did you examine?
A. I don't know. I didn't pay any attention to that. I just noticed that there were cedar balls there on some of the
X. To know that there were cedar balls there?
A. Yes, sir.
X. But on what proportion of the trees do you undertake to say there were cedar balls, that you saw?
A. I don't know. I didn't pay attention to that. I just noticed that there were cedar balls there on some of the trees.
[fol. 93] X. How many trees did you say bore cedar balls?
A. I did not count them.
X. As many as ten?
A. Yes, sir.
X. As many as fifteen?
A. Yes, sir; something like that.
X. Something like fifteen?
A. Yes, sir.
X. There are a couple hundred cedar trees along the drive-way alone, aren't there?
A. Yes, I judge so.
X. What area is covered by the cedar grove on the place?
A. I did not pay any particular attention as to the area. I saw it was a pretty good clump of cedar trees. It has one field of small cedars.

Q. There are 6 or 8 acres of thickly grown trees?

A. Yes, sir.

Q. And there are about 6 or 8 acres more of rather thickly grown trees?

A. Yes, sir.

Direct examination.

Resumed by Judge Tavenner:

Q. Mr. Bowman, are all cedar trees of the same kind, are all red cedars?

A. I understand that all our cedars are known as the red cedar.

Q. They are all alike, there?

A. Yes, sir.

Q. Have you made any estimate as to what would be the cost of cutting those cedars? You have done a great deal of cedar cutting, have you not?

A. Yes, sir.

Q. And you have done it for the State Entomologist, and you have done it in your own private capacity, have you not?

A. Yes, sir. I cut one year, cleaned up above five thousand acres of cedars.

Q. Now, I am going to ask you what would be the cost, or probable cost, of cutting those cedars, assuming that the trees will be cut, six inches from the ground; that the trees be trimmed closely to the size not exceeding two inches at the small end; that the limbs be trimmed to a size not [tol. 94] to exceed two inches at the small end; that the brush be piled up and burned; that the fences be left in as good condition as they are now; and *that the fences be left in as good condition as they are now; and* that the work be done with ordinary and reasonable care; what would be the probable cost of the cutting of those cedars, if done in that manner?

A. If the brush can be burnt along the road where they are—I don't know whether they will allow it or not (a great many of those trees can be burnt in the road where they are because a great deal of the land is rocky), and the men are properly handled, the cost should be between $150.00 and $200.00.

Q. Whether the brush are burnt in the road or out of the road, the cost of cutting and burning them would be, you think, around $175 and $200?

A. Yes, sir; $150 to $200. There are not as many cedars there as were on the Painter tract, and I cut them for $250.00.

Q. The cost would be according to how many days it takes to cut them?

A. I believe seventy-five days would cut them—seventy-five days for one man. I am speaking, now, of wood-choppers, regular choppers. Take regular farming men, they would not be able to do it I don't suppose.

By the Court:

Q. What damage would be done by hauling over the land?

A. The greatest damage that I see would be done would be the damage to the land if they hauled or dragged over it in wet weather. That has been my experience.

Q. What amount do you think would cover that damage?

A. Depends upon the conditions, how bad it would be.

Q. They ought not to be cut in wet weather at all, as far as that is concerned. Assuming that the land was in reasonable condition for the work to be done, what would be the damage?

A. I would think very little.

Q. Well how much?

A. I should not think the damage ought to be over twenty-five dollars at the outside. I don't think it ought to be twenty-five dollars.

Witness stood aside.

[fol. 95] Floyd Bowman, examined by Judge Tavenner, testified:

Q. Mr. Bowman, what is your occupation?

A. Orchardist and produce dealer.

Q. To what extent are you interested in orchards?

A. I have 196 acres.

Q. Have you had any trouble with your orchard traceable to cedar rust?

A. Yes, sir; I certainly have had great damage.

Q. Do you know cedar rust when you see it?

A. Yes, sir, I do.

Q. Cedar rust spells trouble, doesn't it?

A. Absolutely, where you have varieties of apples that take it.

Q. Where is your orchard?

A. One of my orchards is two and one-half miles, I think, in direct line from the Miller cedars, and the other is probably five miles.

Mr. Dechert: Both in Rockingham County?

Witness: Yes, sir.

Q. Mr. Bowman, you have stated that you suffered severe losses in your orchards; I wish you would give your reasons for that, if you can?

A. Cedar rust is the only cause. Up until the last few years I was not able to raise any Yorks that were marketable only for cider. I think 65 to 75 per cent of the apples dropped off before they matured; because the apples were small and green they were not fit for anything but cider.

Q. What were their value?

A. For cider, fifteen cents per bushel.

Q. That did not pay for picking them up?

A. No, sir, it did not.

Q. Now, after the eradication of the cedars, what was your observation as to the effect?

A. Fifteen hundred barrels this year. 1,450 barrels were Yorks. I still have a little cedar rust in that orchard. That orchard is close to the Miller cedars; not close enough to affect the apple, but it affects the foliage some.

[fol. 96] Q. You have spoken of the York variety, have you other varieties of apples that are affected by the cedar rust?

A. Yes, sir. The Ben Davis, Jonathan, Golden, Delicious, Rome Beauty and Jannets.

Q. Are any of these varieties which you have mentioned not susceptible to cedar rust?

A. No, sir; all are infected by it.

Q. It was supposed some while ago that the Delicious was not affected by the cedar rust.

A. I have never seen any Delicious have it. I have seen it a little on the Grymes Golden, and shown in just a few Staymens—I don't think but two had it.

Q. To what extent have you secured the removal of cedars from around your orchard?

A. We have them on the west side of this orchard, I would say they are or four and a half miles, and on the north probably two miles, and on the east a little over two miles.

Q. You still have a little infection?

A. Yes, sir; we have this year.

Q. But not enough to destroy the value of your fruit?

A. No; I had a nice crop this year.

Q. What have you to say as to the value of the cedar tree as compared with that of the apple in your territory?

A. We have practically no cedars in the territory. We cut them over every year. We cut the small cedars. Most of the cedars I have cut in the territory have been white cedars, and white cedars are not fit for anything except for wood.

Q. You are also engaged in general farming to some extent?

A. No, sir; not general farming.

Q. Is that territory in the vicinity of Frank Driver's orchard adapted to fruit growing?

A. Yes, sir; very fine for peach trees.

Q. It is practicable, Mr. Bowman, to conduct orchard operations in the vicinity of New Market if the cedar trees are permitted to grow?

A. Not for apples of the variety that take cedar rust. No, sir; it would not be.

Q. Has it been your observation in the past that cedar rust is found in orchards on other varieties?

A. Yes, sir; it is. I saw it on the Grymes Golden this summer a year.

Q. Now, Mr. Bowman, in the event the cedar tree is re-
[fol. 97] moved from the New Market territory, what effect, in your judgment, would it have upon the market value of the real estate?

A. If they want it for orchards it would increase it very much, very materially, because a man won't buy an orchard

site if he knew there were red cedars and he could not get rid of them. It would be useless for him to undertake that.

Witness stood aside.

C. C. Arehart, sworn, examined by Judge Tavenner, testified:

Q. Mr. Arehart, where do you live?

A. Timberville, Virginia.

Q. What is your occupation?

A. I follow painting during the summer, and I work at most anything I can get to do.

Q. In the winter time you do what your hands find to do?

A. Anything I can do; yes, sir.

Q. Have you done any work in the cedar cutting business?

A. Yes, sir; I did some of it.

Q. In the vicinity of New Market?

A. Yes, sir; I am working on a job there now, on Mr. Shirley's place.

Q. You are removing cedars from Mr. Shirley's place?

A. Yes, sir.

Q. Have you been upon the premises of Mrs. Julia V. Miller recently to see something about the cost of cutting those cedar trees?

A. Yes, sir; I looked over it yesterday.

Q. Have you cut any cedars in the Timberville territory?

A. Yes, sir; I have cut quite a few of them.

Q. Are you from Timberville?

A. Yes, sir.

Q. You have done quite a good deal of cedar cutting, have you?

A. Yes, sir.

Q. After having examined the Miller tract of land, state what would be about the cost of cutting those cedar trees, if you were to cut them, I mean those in Shenandoah county? You know where the county line is there, do you not?

A. Yes, sir.

[fol. 98] Q. Who pointed it out to you?

A. Mr. Schoene told me where Mr. Miller said the line came across. I know where the line is over further because I am pretty well acquainted with that part of it.

Q. You know about where the county line is?

A. Yes, sir.

Q. I am speaking about what it would cost to cut the cedars on the Julia V. Miller land in Shenandoah County, on this side of the county line.

A. I was over there yesterday and went through these cedars, and it will cost around $150 to $200 to cut them off and burn the brush, after trimming it down to about two inches.

Q. When you say from $150 to $200, I will ask you whether that is based upon the cutting of these trees about six inches from the ground, trimming the trees to the diameter not exceeding two inches at the small end and the trimming of the limbs to a size not exceeding two inches, and including the proper burning of the brush, and doing all the work in a careful way?

A. Yes, sir. I base that on the same way the contract reads for Mr. Shirley. I believe the work was to be done in that same way. That is the way I made my estimate.

By the Court:

Q. How many days will it take to do the work?

A. There are five of us working there, and I figure it would take us fifteen days, or seventy-five days for one man.

By Judge Tavenner:

Q. On this Julia Miller tract are there any other shade trees?

A. Yes, sir; there are quite a few young walnut trees and locusts and some other trees that looked to me like elms. I never paid special attention to those. There are quite a few young walnuts towards the south end. And out this way further there are some locust through there.

Q. In the cutting of cedar trees what have you observed as to the condition of the cedars generally, judging from their size and age?

A. Well, I don't know—I counted the rings on one there yesterday. I did ont measure it, but I think it was about ten inches across the stump. There were 87 rings on it. I understand they count a ring to the year. According to [fol. 99] that, there are cedars there that done of us will

ever live to see make posts—part of them—and some of them are large.

Mr. Dechert: It takes 87 years to grow a cedar tree that is 10 inches across?

Witness: It did that one.

Q. You have been cutting cedars, you say, for Dr. Shirley?

A. Yes, sir.

Mr. Dechert: How high up did you measure that tree to get the ten inches?

Witness: It was where a stump had been cut off. About 8 or 10 inches. It was a tree that some one else had cut down there.

Q. Now, you say you have cut Dr. Shirley's cedar trees; were they grown on the same type of land that the cedars are growing on, on the Miller tract?

A. Well, I imagine it is the same land. They are all on the same ridge. Rough land and rocky.

Q. How does the size of the cedars on the Miller tract compare with the size of the cedars on the Shirley tract?

Mr. Dechert: Trees that are of the same size on one tract would be the same size on another tract, wouldn't they?

Witness: No, sir.

A. On the north end of the Miller tract they are very much the same as the Shirley cedars, but on the south end it looks like they don't get the same size. They are not large, except along the fence.

Q. Have you found the cedar trees on the Shirley tract to be sound trees or not?

A. Not by any means; not the large ones.

Q. What has been your observation as to the condition of the large trees?

[fol. 100] Objection; sustained.

Witness stood aside.

W. P. Massie, sworn, examined by Judge Tavenner, testified:

Q. Mr. Massie, what is your occupation?

A. Fruit grower.

Q. What position do you occupy?

A. Secretary of the State Horticultural Society since 1915.

Q. Will you tell the Court whether or not your occupation as a fruit grower, and your position as Secretary of the Horticultural Society, have brought you in contact with the cedar rust disease?

A. Every year since 1915, increasingly.

Mr. Dechert: Do you mean that the disease has been increasing or that your contact with it has been increasing?

Witness: Both. I am sure of the contact part.

Q. When you say the disease is increasing, you mean taking in new varieties?

A. Yes, sir. It has that appearance.

Q. Now, can you give the court some idea of the extent of the fruit growing industry in the Valley?

A. The normal output here in the Valley of Virginia will run a million and a quarter of barrels.

Q. That is pretty well distributed through the Valley, is it?

A. Yes, sir; through the Valley. Of course, the heaviest apple producing sections are Frederick and Augusta counties, and tapering off in the center.

Q. Is this territory, the Valley of Virginia, well adapted to the growing of fruit?

A. One of the best in the East, if not the best.

Q. Does the fruit raised in the Valley of Virginia find ready market in foreign markets, or how does it compare with that produced in other parts of the United States?

A. Practically without exception it tops the market; brings a better price for the same variety than any other section.

[fol. 101] Mr. Dechert: That is, in the foreign markets?

Witness: That was his question; yes, sir.

Q. What varieties, Mr. Massie, are peculiarly adapted to our soil?

A. York Imperial, Ben Davis, Staymen, Jonathan, Delicious, and Grymes Golden are—well, you mean Valley soil?

Q. I am talking of the Valley. The type of soil in the Winchester belt and on through Shenandoah and Rockingham is practically the same?

A. Practically the same. They are some of the varieties.

Q. What varieties that are grown here are best suited for export trade?

A. The York Imperial first, and the Ben Davis second.

Q. How does the York Imperial compare for instance with the Winesap as an export apple?

A. Very superior as regards the demand on that market.

Q. How does the York Imperial compare with the other varieties as a productive variety?

A. It is one of the heaviest producing varieties there are.

Q. What have you to say as to its hardiness, excepting the injury that may result by reason of the cedar rust disease?

A. The apple, or the tree?

Q. The tree itself?

A. Compares very favorably with other varieties.

Q. Has the York Imperial been a long lived tree?

A. Yes, sir; very long lived. It is very hardy and long lived.

Q. I will ask you also as to the ability of the York Imperial variety to withstand cold and late spring frosts and freezes?

A. That has been demonstrated very forcibly in the last few years. It stands considerably greater degree of frost than some other varieties.

Q. More so than the Winesap?

A. Yes, sir. The Winesap is not a particularly advantageous apple in this section.

Mr. Dechert: You mean as a commercial apple?

Witness: Yes, sir.

Q. What are the real commercial varieties for this territory, if you can name them in order?

[fol. 102] A. The York Imperial, first; the Ben Davis, the Staymen Winesap, and then, perhaps, it would be a question as to whether it would be the Jonathan, Grymes Gol-

den, or the Delicious. That is practically the crop of desirable commercial varieties.

Q. Mr. Massie, your position and your work has brought you, you say, in close contact with the injury done by the cedar rust disease.

A. Yes, sir.

Q. Now, I want you to state whether it is practicable to produce apples of the varieties named with the cedar tree in close proximity to the orchard?

A. Absolutely impossible.

Q. Have you in mind any illustrations of the effect of the removal of the cedar trees on the productive value of orchards?

A. I have seen numbers of them, a great many, and the evidence is unmistakable.

Q. You have not seen the Julia V. Miller cedar trees, have you?

A. Yes, sir.

Q. I want you to tell the court whether or not, in your opinion, that land or land in that territory is adapted to fruit growing?

A. Oh, yes, no question about it.

Q. Having observed and having been interested in the removal of cedar trees in fruit growing territory, I am going to ask you what injury Mrs. Miller would sustain, or damage she would suffer, by the act of cutting and removing the cedar trees from her land?

A. Even from a purely agricultural standpoint, I can conceive of no damage that she would suffer by reason of their removal.

Q. You know something of the orchard holdings in the southern end of this Valley, do you not, and around Mt. Jackson?

A. Yes, sir.

Q. Is not the apple production there very heavy?

A. I think so, as far as production per tree is concerned.

Q. Some question has been asked here as to whether or not the disease of cedar rust is extending to new varieties of apples that had not previously been affected; is that correct or not?

A. The evidence goes to show that the disease is either becoming more successful in its attack on other varieties,

or that the resistance of the varieties heretofore more resistant to this disease is breaking down. In other words, it is a fact that the disease is attacking even with more vigor those varieties that have hitherto been more susceptible to it; and with increasing effect upon those varieties that have heretofore been apparently more or less resistant. [fol. 103] Q. Some question was asked as to the effect of the disease upon the Delicious variety; have you observed that effect?

A. I have observed the effect of the disease on the Delicious in my own orchard where I have about two thousand Delicious trees that are showing up cedar rust some. We have cut most of the cedar trees around us, but there is some cedar rust. The evidence is that they are somewhat susceptible to the cedar rust.

Q. It causes a crumbling of the eye-end of the apple?

A. The blossom end; and it ruins the fruit for commercial purposes.

Q. Is that variety a commercial variety?

A. The highest priced variety we raise—the Delicious.

Q. Do you know of any variety of apple that is entirely immune to this trouble?

A. I know of none.

Cross-examination.

By Mr. Dechert:

X. A million and what was your statement of the quantity of apples produced in the Valley section?

A. A million and a quarter.

X. What?

A. Barrels.

X. There are three bushels to a barrel?

A. Yes, sir.

X. You are speaking of the commercial apples?

A. Yes, sir; those are the only ones of which we have any record.

X. What proportion of those apples are marketed beyond the State of Virginia?

A. Prectically all of them.

X. Practically all?

A. Yes, sir.

Q. What percentage of those is marketed in foreign lands; I mean by that, in England, Germany, Australia, and elsewhere than in the United States?

A. Perhaps half of them.

X. And where is the bulk of those which are marketed here sent?

A. Both North and South.

[fol. 104] By Judge Tavenner:

Q. In view of the questions Mr. Dechert has asked you about the direction the shipments take; do you know of anything that compares in value with the York Imperial as a marketable apple in the markets of the United States?

A. It stands high as a merchantable apple in the markets of the United States, perhaps, one of the best general, all round, all purposes apple grown.

Witness stood aside.

T. B. Byrd, sworn, examined by Judge Tavenner, testified:

Q. Mr. Byrd, where do you live?

A. Winchester, Virginia.

Q. In what business are you engaged?

A. Orchardist.

Q. To what extent are you engaged in the orchard business?

A. My brother and I own an orchard at Timberville, Virginia, of 300 acres; and I manage two orchards for him, one at Berryville of 600 acres, and one in Frederick County of 200 acres.

Q. Have you observed the ravages of the cedar rust disease?

A. Yes, sir. We particularly had trouble with it at Timberville. We bought that orchard in 1919, and the cedars were not cut. The orchard was then young; and what apples there were of Yorks and Ben Davis were ruined in 1919 and 1920, and they froze in 1921. The Yorks were ruined in 1922. We began cutting the cedars in 1920, the year after we bought the orchard, and we finally got a crop of Yorks in 1923; and we had one in 1924, and one in 1925,

but we still have some cedar rust. Cedar rust affects the Ben Davis commercially more than it does now the Yorks. We can still see some cedar rust on the York leaves. However, the apples themselves are satisfactory from a commercial standpoint.

Q. The cedar rust does not affect the leaves of the York and destroy the apple, now?

A. No, sir; but it does affect the Ben Davis. Spotts come on the Ben Davis variety.

Q. Have you any Roman Beauties?

A. No, sir; not up here. We have some at Berryville.

[fol. 105] Q. Have you any way of fixing the number of barrels you lost by reason of the cedar rust trouble from the Timberville orchard?

A. I have no way of fixing it except in the case of the Ben Davis apples. In -924 I figure we lost, I think, 600 barrels of Ben Davis. We do not grow a large quantity of Ben Davis there. We have only 1,500 trees.

Q. Now, you have removed the cedar trees from the vicinity of your orchard to what distance?

A. The closest cedars of any consequence are about three miles and a half, possibly.

Q. You still have some cedar rust trouble?

A. Yes, sir.

Q. The two-mile limit does not produce perfect protection?

A. No, sir; I do not think the two-mile limit is enough for protection. Where there is a very big crop of apples involved, we, in fact, try to cut cedars for five miles.

Q. How far is your orchard, of which we have been speaking, from the Julia A. Miller cedars?

A. About six miles.

Q. Is that territory in the vicinity of Julia V. Miller's, or within two miles of it, well adapted to fruit growing?

A. That general section is a very fine fruit section. Whether it is fruit land around the Miller cedars I do not know, because I have never seen it.

Q. But that territory is?

A. That section is very fine. One of the best I know of for apples.

Q. Mr. Byrd, in that territory, can apples be produced profitably with the cedar trees in close proximity to the orchard?

A. No, sir; in the Northern Valley the apple cannot be produced anywhere near the cedars; that is, the varieties that are susceptible, and they include the most important commercial varieties. There is no orchard, in my opinion, that could be profitable, no matter what the varieties, if it was near cedars.

Q. Are the cedar trees in the southern end of this county of any real commercial value?

A. I cannot say, sir. I don't know anything about that.

Q. Do they exist there in quantities to be of any real commercial value?

A. I don't know, sir. I just do not know anything about the value of cedars.

[fol. 106] Mr. Dechert: And you are not going to say?

Witness: No, sir.

Q. Now, of the varieties of apples that are specially adapted to this territory, what have you to say as to the prominence of the York Imperial?

A. I consider the York Imperial the most profitable variety in this section.

Q. Will you give your reasons for it?

A. The York Imperial is the longest lived tree, and, after reaching the age of twelve or fourteen years, bears very prolifically. It is very readily salable, and can be distributed over a wide territory, that is, both in this country and in Europe. It is peculiarly adapted to this section, provided cedars are not present. And for these reasons I think it is most profitable, as a commercial variety, that we grow.

Q. As a matter of fact, how does it compare in numbers, as to the planting of trees that have been made in the past?

A. Of the bearing trees, more are bearing in the Valley of Virginia than any other varieties.

Witness stood aside.

Memo.: Court adjourned until 9:30 A. M., tomorrow morning, January 21, 1926.

Thursday morning, January 21, 1926; taking of testimony on behalf of State Entomologist continued, as follows:

C. O. MILLER, sworn, examined by Judge Tavenner, testified:

Q. Mrs. Julia Miller is the appellant in this case?
A. Yes, sir.
Q. She is your mother?
A. Yes, sir.
Q. Will you tell the court from what source she derived the tract of land now in controversy?
A. My father, A. S. Miller, owned it. You just want to know as to the land in Shenandoah and in Rockingham counties?
[fol. 107] Q. My father owned about 125 acres at his death, and he left that to my mother during her life, and at her death it is to go to my sister and myself, the two heirs. Then there were seventeen, or possible twenty acres, that I bought since his death, which is the twenty-acre tract lying immediately on the Valley pike. The land lies on both sides of the county road going through the farm.
Q. Now, the tract belonging to your mother, then—(changing)—You say you bought some land on your own account?
A. On my own account, but it is all farmed together. I take it that this proceeding includes that. The whole tract is about 150 acres; it is rectangular; well, it has four sides, but they are not exactly at right angles all the way around. It lies on the Valley pike and runs back, I can't give you the exact number of poles, west. The south line is the county line; then there is a right angle at the back end of the farm, and the north and south sides are about parallel, but the Valley pike is not exactly at right angles to the county line.
Q. The acreage calls for one hundred and fifty acres.
A. That includes the land I bought; well, my sister and I own it.

Stipulation of Counsel: It is stipulated that C. O. Miller and Ada V. Miller, just referred to as owning a part of the land embraced in the notice in this proceeding in fee, may be made parties hereto without further process, and

it is agreed by Counsel for the State Entomologist that they may be so treated; and that there need be no differentiation in these proceedings between the land owned by the defendants just named and the original defendant; that the damages may be awarded jointly to them, and they be left to decide among themselves as to its distribution. This is without waiving the objection of any of the parties to the entire proceedings. Also the two last named defendants adopt the grounds of defense filed by Julia V. Miller in this proceeding.

Q. Now, will you give us a little more definite idea as to the metes and bounds of the 150-acre tract?

A. The part that belonged originally to my farther is 208 poles from the southeast corner to the southwest corner of the tract.

Mr. Dechert: The southeast corner is in Rockingham County, is it not?

[fol. 108] Witness: It is on the county line.

A. (contd.) The farm runs up to the Rockingham County line, and I am giving you the southeast corner, and running from there along the county line to the southwest corner it is 208 poles. The twenty acres, or seventeen arces, or whatever it is, join this tract.

Mr. Dechert: Does the seventeen acres lie to the east of the other tract?

Witness: It lies to the east. You see, the line of my father's tract correspond to what was the old road before the Valley pike was established; then I bought what was between the old road and the Valley pike. That old road was not quite parallel to the Valley pike, but approximately so.

Q. So that the tract now extends from the rear, west, to the Valley pike?

A. Yes, of course, the 208 poles does not take in the width of this strip that we bought.

Q. It lies to the Valley pike on the east, the Rockingham County line on the south; and on the west and north it extends to whose lands?

A. On the west it joins the land that belonged to Mrs. Frank Zirkle. That tract has been divided up, now, and there are three or four different people own it. On the north it joins the land of Tom Shirley and the lands now owned by the two Mrs. Millers and Mrs. Harner.

Mr. Dechert: Is that the 155-acre tract?

Witness: Yes, sir, the 155 acres runs out to the Valley pike and includes the purchase that I made which belongs in fee simple to myself and Ada V. Miller.

Mr. Dechert: The land that you have just described is the part of the land lying in Shenandoah County?

Witness: It is all in Shenandoah County.

Q. Doesn't your mother own land, adjoining this land, in Rockingham County?

[fol. 109] A. Yes, sir; 46 acres that joins it on the southwest end of the county line.

Q. You pointed out to Mr. Schoene about where the county line ran through there?

A. Yes, sir.

Q. And to Mr. Willey, too, did you not? You know Mr. Willey?

A. Yes, I know Mr. Willey, but I don't remember whether I pointed the line out to him or not. If he says so I will admit that I did.

Q. I don't know that he does say so, but it was someone with Mr. Schoene?

A. I went with Mr. Schoene by himself. Mr. Willey was not along at the time that I remember going with Mr. Schoene.

By Mr. Dechert:

X. As I understand it, Doctor Miller, the roadway leading into the residence and the trees bordering that roadway are situated in Shenandoah County?

A. Yes, sir.

X. Is the grove of cedars that has been alluded to here entirely in Shenandoah county?

A. There are two groves, you might say, in Shenandoah County; one northwest of the residence, barn, and buildings; and the other a little west of south; and that grove

on the south is continuous with the cedars in Rockingham County.

X. Then a part of the second grove is in Rockingham County?

A. Part of the second grove is in Rockingham.

X. How much of that second grove is in Shenandoah?

A. I take it that there are about eight or ten acres in Rockingham County of the second grove; and of that second grove there are not over two acres in Shenandoah County.

By Judge Tavenner:

Q. That is the second grove; where is the first grove?

A. The first grove is northwest of the barn and is larger; that has, possibly, four, five, or six acres. We had a hog and cattle lot back there, but it is not all grown up in cedars, but I judge four acres of it are pretty well set in cedars.

Q. They are all in Shenandoah County?

A. And the roadway is all in Shenandoah County?

A. Well, the roadway goes through the farm. It runs [fol. 110] in a direction not quite parallel with the Rockingham County line. It runs northwest about half way through the tract, and then it turns and goes southeast through the Shenandoah part, and on to Rockingham.

Q. Until it makes an angle it is entirely in Shenandoah County?

A. Yes, sir. The drive-way beyond the buildings is in Shenandoah.

Witness stood aside.

Clark R. Willey, sworn, examined by Judge Tavenner, testified:

Q. Mr. Willey, what is your occupation?

A. Assistant Entomologist.

Q. How long have you been engaged in that work?

A. Since the 15th of June, 1920.

Q. As part of your duties have you been assigned to the work of eradicating cedars where they have become a nuisance to orchardists?

A. Yes, sir.

Q. Your duties have confined you chiefly to what territory?

A. In the counties in the Shenandoah Valley, and across the ridge in Nelson, Albemarle and Fauquier counties, and in Rappahannock, too.

Q. Have you traversed the counties of the Valley to any considerable extent and had opportunities to observe the orchards in this territory?

A. Yes, I was born and raised in the Valley and lived here until I was sixteen years old, and I have been working in the Valley for the last five years, practically, every winter.

Q. To what extent is the Valley of Virginia devoted to the growing of apples on a commercial scale?

A. Well, the State of Virginia ranges from third to fourth in the United States as an apple growing state; and the apple growing district of the state is almost entirely in the Shenandoah Valley.

Q. What opportunities have you had to study and observe the action of the cedar rust?

A. I had about all the opportunity that could possibly be afforded to a man. I have worked in the Valley of Virginia for the last five years, in the spring, fall and winter, and have observed the orchards at these various times, and taken notes several years on the conditions.

[fol. 111] Q. Have you made any study of the cedar rust disease and investigation?

A. I have not made any extensive study of the disease in a pathological sense. I have observed its occurrence and I have made a study of the results of the disease.

Q. I want to ask you whether or not you made any comparative tests to ascertain positively and certainly whether the cedar spore was the cause of the trouble?

A. Yes, sir. For two years, when I was a student in High School, I worked with men from Blacksburg in the Larrick & Larrick orchard where our experiments were performed with the cedar rust disease; and since I have been at Blacksburg, each year for a couple of years, I have made tests for myself, and found in each case the cedar rust disease caused what is termed the cedar rust spots on the leaves and on the apple.

Q. What tests do you mean? Name some of them.

A. Most of the tests that could be made were made by putting the small cedars under bell-jars and exposed them in the fall to leaves infected with the cedar rust disease, and observed them over the years to see the balls develop; and by a study of the apple leaves, putting leaves under the bell-jars, and in cloth, so they would not be exposed to the cedar rust infection except when the balls, in the spring-time when they began to ripen—I guess that is a good term to express when the tenticles came out and the spores are given off. Now, these cedar balls at that time were put in these bell-jars so that the spores could go off and fall on the foliage. Right by the side of these cedars were apple branches which were not exposed to the disease, and it was found that those leaves that were not exposed to the infection staid green, did not have spots on them as those leaves did that were exposed to the infection.

Q. In other words, the apple leaves under the bell-jars that were exposed to the infection from the cedar balls were how affected?

A. They got the typical cedar rust spots.

Q. And the leaves that were placed under bell-jars, at the same time, and were not exposed to the cedar balls, had no cedar spots?

A. They were free from spots and staid perfectly green and healthy.

Q. You have made several tests of that kind, have you?

A. Yes, sir.

Q. What is the use of the bell-jar?

A. The use of the bell-jar was to keep the leaves from being exposed. If we had not covered the leaves they would probably have been exposed to the infection.

[fol. 112] Q. And the result would have been unsatisfactory?

A. Yes, sir.

Q. The bell-jar, in the one instance, protected the cedar ball and the foliage from outside interference?

A. Yes, sir; kept it from getting any outside infection.

Q. And likewise the bell-jar that contained merely the apple leaves or branches were protected from outside infection?

A. Yes, sir; kept it from infection.

Q. In the one case you found infection from cedar rust, and in the other you found none?

A. Yes, sir.

Q. And you have made several experiments with that kind of test, have you?

A. There were 100 tests made on various varieties of apples.

Q. Mr. Willey, you have had occasion, then, to observe the action of the cedar rust upon the orchards, and you have had occasion to observe the orchards themselves, have you, to see how they produce?

A. Yes, sir.

Q. What varieties are the most productive in the Valley of Virginia?

A. I would not say which varieties are the most productive, but there are certain varieties that are grown more than others—the Yorks, Staymens, Ben Davis, Black Twig, Roman Beauty, Jonathan and Grimes are probably the principal varieties grown in the Valley.

Q. From your observation will you state to what extent these varieties are subject to cedar rust disease?

A. I have found cedar rust on all of these varieties of apples I have mentioned, but it has been very slight on the Grymes and probably a little heavier on the Staymen than on the Jonathan and Rome Beauty. The Yorks and the Ben Davis are very susceptible.

Q. How about the Wagner, or do you know about that variety?

A. There are not many of that variety grown, and I am not well acquainted with it.

Q. Have you observed whether or not the cedar rust disease is affecting an increasing number of varieties of apple as the years go by?

A. When we first started in the cedar rust work, I had not seen cedar rust on Staymens or Black Twigs, old Winesaps or Grymes, but in the last two or three years I have seen cedar rust on these varieties which shows that they are susceptible. The number of varieties is increasing that are susceptible to the disease.

[fol. 113] Q. In other words, the cedar spore is being adapted to other varieties?

A. It seems that it is adapting itself to other varieties.

Q. You have mentioned some of the varieties; let me ask you whether or not the Jannet and the Wealthy are susceptible to the disease?

A. Yes, sir; the Jannet is very susceptible.

Q. That is a common variety here in the Valley, is it not?

A. It is not grown extensively.

Q. It is a home orchard variety?

A. Your orchard is the only home or commercial orchard that grows them to any extent, I believe. There are a number of Jannets grown in Augusta county. I had opportunity to observe the cedar rust there, and it is very bad on them.

Q. Have you any assurance, or any reason to believe that the disease will not finally atack every variety and attack it seriously?

A. The indications are that there will be no varieties that will get by without some infection.

Q. What remedy is there for the eradication of the disease?

A. There may be several remedies that are impracticable; the only practical remedy is the removal of the cedars from the vicinity of the orchards.

Q. Will you tell the Court about what is the danger-zone of the cedar spore?

A. For ordinary seasons two or two and a half miles distance will render an orchard practically safe; but I have observed orchards where the cedars were cut back two miles all around, where there were great volumns of cedars just beyond that margin, that were practically total losses. But for ordinary seasons the same orchard has come through with very nice crop of fruit, and with light infection.

Q. The spore is supposed to be carried by the winds?

A. I would not say by the wind; it would be better to say by the atmosphere.

Mr. Dechert: Sort of like a bal-oon?

Witness: Yes, sir.

A. (contd.). They pass off from the cedar ball and travel around like you have seen particles of dust. You have observed through a window particles of dust circulating—they rise and fall and go all around. The cedar spore is

very much similar to these particles of dust that you are [fol. 114] able to see with your naked eye; they are kept up and carried in all directions just as the atmosphere changes and moves.

Q. Your idea is that it is not limited to two miles, but that the infection would be diminished as the distance increases?

A. Yes, sir. But under favorable conditions the disease would be liable to be carried, and the spores would live over a longer time and go a further distance, than they would under favorable conditions.

Q. You have spoken of the spores being carried or distributed by the atmosphere; what are the causes of their destruction?

A. The spores are fungus spores and the disease germs are killed by sun-light. They may not all be killed, but the sun-light is one of the best disinfectants we have. These spores require moisture in which to live, and the sunlight causes them to dry and for want of moisture they die.

Q. Excessive heat kills them?

A. Yes, sir.

Q. Mr. Willey, traversing the Valley, what have you discovered as to the adaptability of the soil in the New Market territory for the growth of apples and fruit?

A. The soil of the New Market territory is very comparable to the soils on this ridge that runs practically from one end of the Valley to the other. The indications are that it is very good orchard territory.

Q. Is the land naturally strong fertile land or not?

A. As a whole; yes, sir.

Q. How do the lands in that vicinity lie with reference to elevation? Are they suitable for orchards, or do those lands lie in pockets where fruit is hard to cultivate every year?

A. The location is very good, because the river is on one side and Smith's Creek on the other, and you get air draft, which is very necessary for the orchard districts.

Q. What opportunities have you had to observe the land of Mrs. Julia V. Milller on the other side of New Market?

A. I have been over it several times a year, I think, for the last three years. I have observed it pretty closely.

Q. Is it naturally good land?

A. Yes, sir; it is very good land.

Q. Have you any estimate of the quantity of cedars on this tract of land?

A. Yes, sir; I have counted them to the best of my ability.

Q. Did you make a memorandum of it?

A. Yes, sir.

[fol. 115] Q. Have you that memorandum?

A. I have it in my note-book, but can tell you without reference to it.

Q. Make your statement.

A. You want to know the number of cedars in Shenandoah County, in Lee District?

Q. Yes, sir; only in Shenandoah County?

A. From the pike to the house along the lane on the south side there are 119 cedars from two and a half inches up, probably only five or six that would run as small as two and a half inches, most of them from four to ten inches. On the north side there are 96, I believe. Right in front of the house, along the fence between the house and the barn, on the north side of the house, there are two trees. Then in a lot north or northwest of the barn, between the barn and the larger tract, there are 148, more or less scattered in a lot of four to six acres. And scattered over the ridge there are a couple of acres. It is a cedar grove. They are all mature trees and have been trimmed up in years past. Then around the fence and in the field there are thirteen large ones. The field is west of the house and below the road that goes into Mr. Minnick's place and on through to Timberville. From the county line between Rockingham and Shenandoah counties, north, there were 223 trees, I believe, from three inches up. Computing those in the field and along the back road and in this grove the total was 235 trees. In the grove most of the trees are second growth and are small, about three, four, or five inches, that is, at the ground. I counted trees that were three to three and a half inches at the ground. There are several hundred small brushes in the pasture field, and probably a hundred small cedars scattered around the fence and in the grove I was speaking of.

Q. What difficulty would attend the cutting of these cedars?

A. Those cedars up the road leading from the pike to the house, care would have to be used in throwing the trees so they would not fall over the fence. They would have to be cleaned up at the road, and in all probability, they would have to be hauled or dragged away as they were cut. This could be accomplished by a couple of horses pulling the brush up the lane and around the grove, and the cedars burned at bare places along the fence there. As to the cedars growing along the fence, care would have to be taken or exercised to throw them away from the fence. I have in some instances removed the rails from a fence like that, so a man could go in and notch them and saw the trees and haul them from the fence. There are only a few trees, however, that would need that attention.

[fol. 116] Q. But there would be a few along the road and along the fence, too?

A. Yes, sir, along the fence in the pasture field that I just mentioned there are some four or five down the rail fence. That is the rail fence that probably would have to be to moved to saw the trees off. They could be cut and thrown away from the fence, but you would have to make a notch within ten inches from the ground on the large trees. The cedar trees in the grove, I guess you call it a grove, on the hill-side there, could be thrown without any difficulty and the brush burned on the spot, because where these trees are thick there is no fence and it would not be hard to burn them. There are some rockbrakes there that they could be moved to and burned.

Q. At the present time are there any fields under cultivation where the crops could be injured by the cutting of those cedars and destroying them?

A. No, sir. In those fields along the road, it would not be necessary to throw any of the cedars—only one or two—in the field, and that would not be enough to damage any crop. I have cut cedars on sod land and on wheat land, and on most every kind of land, and I find that in cutting cedars on wheatfields when frozen they can be dragged over the wheat without injuring it at all. I have cut cedars in June when the wheat was pretty ready to head. We did not drag the brush over the wheat, but there was at one place something like 45 trees that had to be cut and thrown in the wheat and had to be trimmed there, and it looked

like the wheat was pretty badly damaged, but when harvest time came you couldn't see any damage at all. That was on a place back of Woodstock two miles. On grass you would not want to go into that in muddy weather with a wagon, that would be unreasonable and would cut up the sod; but if the sod is dry the brush can be dragged off and considerable work done without injury to the grass at all.

Q. You and Mr. Henry Bailey have charge here of the cutting of the cedars, have you not?

A. Mr. Bailey has done considerable work for us, yes, sir. I have had charge of the work and done it in all of the Valley this side of the mountain, and I don't think we have damaged anything at all, except once in a while a tree will get away and fall over a fence. It we break a fence, of course, we repair it.

Q. Your business is to exercise care of the removal of the trees?

A. Yes, sir; we always do that.

Q. Now, if these trees are cut under the direction of the Court by the State Entomologist, to a height not exceeding six inches from the ground where it is practicable to cut [fol. 117] them that low, and the trees are closely trimmed to a diameter not to exceed two inches at the small end, and the limbs are likewise trimmed to a diameter not exceeding two inches at the small end, with the brush piled and burned, that the fences where they may be at all injured by the cutting and throwing of the cedars are repaired and restored to as good condition as they are now, and in the event that work is done at a proper time and done with proper care, what damage or injury would be sustained by Mrs. Miller, and those interested in the land, in the cutting and removing of the cedars?

A. I think none whatever.

Q. Now, did you observe whether or not under those cedar trees grass is growing to any considerable extent?

A. Under some of those trees out in the open where they have been trimmed up for years, of course, there is grass, but where the trees are close and more especially in the groves there is no grass.

Q. Now, from your observation, and you have been at this work quite awhile, what would be the result of the removal of these cedar trees?

A. You mean as to the grass?

Q. As to the grass; yes, sir.

A. In every instance that I have been able to observe the ground is covered over in grass and grows up with good sod. I am sure that this would be the case at Mrs. Miller's. On this end of the cedar grove there is a block in there of some four or five acres that has fine blue-grass sod on it; and on the other end where cedars have been removed it is the same way; and in sunny spots, exposed spots, in the grove, the grass is the same way, is growing; and the ground shows every indication that it would grass over in the course of a short time. Of course, on the rocks you could not expect grass to grow or anything else. There are some places where the rocks are exposed and you could not expect grass to grow there.

Q. What is the character of the soil?

A. It is a good limestone soil with clay sub-soil.

Q. It will naturally produce blue-grass? You say "sod"; you mean blue-grass?

A. Blue-grass; yes, sir. The proof that it will is the fact that blue-grass is growing there right up against the area covered by cedars.

Q. Then your opinion is, from knowledge of similar [fol. 118] situations, that in case the cedars are removed from the Miller land the ground will be covered with a sod of blue-grass?

A. I believe that in the course of a couple of seasons Mrs. Miller would have a very nice sod.

Q. Now, some suggestion has been made in relation to shade trees in the event these cedars are removed how will it effect the shade in the fields?

A. It will take away a lot of shade that ought to be taken away, in the first place, and it will leave a lot of good shade there for stock, as there are a good many walnut and locust trees growing around there that would afford ample share.

Q. Now, you have spoken of some large trees, cedars that have a diameter of as much as 10 inches; that is a good sized cedar tree, is it not, in this territory?

A. Yes, sir.

Q. What condition are they generally found to be in, now, at this time in your cutting of them in this territory?

A. I find in the ridge cedars from ten inches up they run pretty high in dotiness and being hollow. I counted 86 trees on the Shirley place from 4 inches up, and forty-five of them were either dotted or had hollow places in them.

Q. When you say dotted what do you mean?

A. They have a corky appearance and will not make lumber. It shows that the trees are past maturity and are on the down grade.

Q. What percentage of the trees did you estimate on the Julian V. Miller tract that are of that size and would indicate the same condition?

A. I would say from a half to two-thirds.

Mr. Dechert: That are dotty or hollow?

Witness: I would not say that because I have not examined the trees, and that could not be done until they were cut; but judging from the examination made of the trees cut just across the fence.

Mr. Dechert: What do you mean by dotted?

Witness: A cedar tree that has become softened and corky.

[fol. 119] Q. What measurements have you made as to nearby orchards?

A. I only measured from one orchard, and that is the largest one located there very near; that is Mr. Driver's orchard.

Q. What measurements did you make?

A. I just measured from the orchard through the Julia V. Miller land. Starting at the orchard, I measured down to and through the Miller tract of land. The distance from the Driver orchard through the Miller land is 7,700 feet. We started from the orchard and measured right straight down the ridge and it passed 25 feet from the Shirley tract across the fence.

Q. Who were present and helped to do the measuring?

A. Prof. Schoene and I measured the distance.

Q. What did you have to measure with?

A. 100-ft. tape line.

Q. Steel tape?

A. No, sir; it was a cloth tape. I think we would have gained in distance if he had had a steel one, the wind was blowing so hard.

Q. About what was the size and character of the Driver orchard?

A. It is about a twenty acre orchard. It is fairly clean and showed signs of being very well cared for.

Q. What direction is the Driver orchard from the Miller cedars?

A. South, and just a little west.

Q. Have you had occasion to observe the condition of that orchard during the season of cedar rust infection.

A. Yes, sir; I have.

Q. Now, do you know of any other orchard nearby to these cedars?

A. There are several small orchards located around back of New Market, or probably an acre or two.

Q. How near are they, do you know, to the Miller cedars?

A. They are all within a mile, I think, of the cedars.

Mr. Dechert: There are none of the commercial orchards, are they?

Witness: Well, I don't know just what you term a com- [fol. 120] mercial orchard. I was talking to a man yesterday and he said that if you had one tree and sold apples that would be commercial; but you wouldn't consider that true from a commercial standpoint.

Q. What other orchards are in the vicinity of the Miller cedars, not immediately but in that territory?

A. Of course, down the pike four or five miles is the Turkey Knob and Strathmore orchards, and the Chapman orchard.

Q. The Chapman Manor orchard?

A. And back of that is the Scott Grant orchard, then the Mt. Clifton orchard, and the Byrd orchard.

Q. The two Doll orchards?

A. Yes, sir, at Quicksburg. And there is the Bushong orchard this end of New Market.

Cross-examination.

By Mr. Dechert:

X. You are not a practical farmer?

A. No, sir.

X. You said a while ago that there might be some methods of treating these trees but you did not regard them as practical; what are those methods?

A. They have found that by using bluestone, that is copper and sulphur spray, they could kill the cedar rust spore, but it would have to be so strong that it would kill the apple leaf also.

X. You think it is the cedar only that is to be crucified?

A. Comparing the apple industry with the cedar industry, and the comparative values to the Valley as a whole, I think the cedar is the one that ought to be removed.

X. There are other industries in Shenandoah county than the apple industry?

A. Considerably so.

X. The apple industry is by no means the only industry in the Valley of Virginia?

A. No, but it is the largest of all the industries.

X. But there are many, many more?

A. Yes, sir.

X. I do not understand you to say that you know that the cedar trees, or any of them, on the Miller land are [fol. 121] hollow, or dotted as you call it?

A. Yes, I know that some of them are. Some of them are standing there have big split places in them.

X. How many?

A. I never counted them.

Direct examination.

By Judge Tavenner resumed:

Q. I omitted to ask you, what examination have you made of the cedars standing there to discover whether or not they had cedar balls on them?

A. I have been looking at them for a couple of years, now, and I find that they are heavily infected with cedar balls, generally.

Q. Is any red cedar immune to the disease?

A. I have not found any.

Q. Small or large?

A. No, sir; age does not seem to make any difference.

Q. Suppose in examining a cedar tree now it did not happen to have cedar balls on it, does that mean that it is not infected with the disease?

A. No, sir; the spores that fall on the cedar trees this fall are dormant; they would have to be magnified 800 times to be seen, and they begin their growth next spring, and

next winter cedar balls will be there as evidence of the infection this fall. In the spring of 1927 these balls produce the spores for the infection.

Q. So long, then, as cedar trees stand near orchards, or near apple trees, what have you to expect from the ravages of the disease?

Objection, overruled, exception.

A. You can expect the disease to grow as long as that condition exists.

Q. Is the spore conveyed to the apple tree from any other source than the red cedar?

A. So far as is known, that is the only source.

Q. Does any other tree than red cedar act as host plant to the apple family, and operate as a host plant for the cedar rust disease?

[fol. 122] A. There is a cedar that grows in the South that the disease has been found on, but that cedar does not grow this far north.

Q. Then you mean to say that there is no other tree in this territory than the red cedar that is host plant of the disease?

A. Yes, sir; that is what I mean.

Q. The cedar trees that are on the Miller tract are of what variety?

A. Red cedars.

Cross-examination.

By Mr. Dechert:

X. Now, sometimes the spore goes from the cedar tree to the apple, and sometimes from the apple to the cedar tree, does it not?

A. Yes.

X. In other words, the disease may originate on either the apple or the cedar; or is it a disease that originates in the apple and is transmitted to the cedar?

A. I hate to say where it first originated because cedars and apples were here a long time.

X. That reminds you of the hen and egg question?

A. I don't know that.

X. The question referred to is whether the hen or the egg came first.

A. If you answer me that, I will tell you where the disease started first.

X. Now, you do not know that a cedar tree has any infection unless you can see the cedar balls?

A. No, sir. You cannot guarantee that it had any infection unless you see them in the beginning.

X. Then you do know that, so far as your observation and knowledge derived in the manner you have mentioned goes, the disease is not communicated from the cedar tree to the cedar tree, but that in order for a cedar tree not now infected to become infected—supposing there be two trees in a grove one affected and the other not,—the spore must go first from the infected cedar tree to the apple tree and back from the apple tree to the cedar not infected?

A. It must go either to the apple or to some tree of the apple family, possibly a wild apple.

X. It does not go directly from apple to apple, or from cedar to cedar?

[fol. 123] A. No, sir; it is not transmissible from cedar to cedar nor from apple to apple.

—. You told us about experiments which you conducted with bell jars; I don't know what they are; I don't know what you mean by that, really. They are jars that go down over the object that you are trying to enclose and protect from infection, aren't they?

A. Yes, sir.

X. You have told us of an experiment you tried which resulted, you thought, in disclosing that where a piece of cedar and an apple were placed under a bell the apple took the infection; did you ever succeed in cultivating a cedar ball that way?

A. I believe in my own experiments I have not tried to get the cedar ball; but in experiments conducted at Middletown, that I had an opportunity to observe and take note of, there were several instances in which they seemed to get the infection on the cedar.

X. Was that on a piece of cedar that already had some balls?

A. No, sir; that was on cedar that had no balls—live cedar.

X. Were all the cedars on this Miller land that is involved in this case within two miles of the Driver orchard?

A. Yes, sir; well within two miles.

W. R. Doll, sworn, examined by Judge Tavenner, testified:

Q. Where do you live, Mr. Doll?

A. At Quicksburg just now. My home is in Roanoke, but I am staying in Quicksburg now.

Q. Have you an orchard in that vicinity?

A. Yes, sir.

Q. Of what area and what varieties?

A. About 70 odd acres of Yorks, Jonathans, Bens, Grymes and Delicious.

Q. How far does your orchard lie in a straight line from the Julia V. Miller cedars?

A. I suppose, about 4½ or 5 miles.

Q. What other orchards in your immediate vicinity of about the same distance or less distance?

A. The Driver orchard which you were just speaking of; there is the Scott Grant orchard which is probably nearer than mine, and the Bushong orchard which is also nearer than mine.

[fol. 124] Q. The Bushong orchard contains how many acres, do you know?

A. I suppose, about 10 or 12 acres; something like that.

Q. It lies about two miles, does it, from the Miller cedars?

A. Yes, sir; about two miles.

Q. Since 1923, have you had the cedars removed from the vicinity of your orchard?

A. Yes, sir.

Q. Prior to 1923 what apple crops did you have worth mentioning?

A. I had some Ben Davis and a few Grimes, I think.

Q. What was the effect of the cedar rust upon that orchard prior to 1923, before the cedar trees were cut?

A. I could not grow any apples of any commercial value on the Yorks and the Jonathans.

Q. You have stated that you had considerable cedar

trees removed from that territory; what has been the result since the removal?

A. Last year I had some very find Yorks and also Jonathans.

Q. How does the cedar rust affect the Jonathan apple?

A. The leaves will turn brown and yellow, and the fruit will not mature.

Q. In other words, they prematurely turn brown and fall off?

A. Yes, sir.

Q. And leave the apples on the tree?

A. Yes, sir.

Q. In an immature condition?

A. The apples will not mature.

Q. Can you grow these varieties, the York and Jonathan, and other varieties, profitable in your territory?

A. Yes, sir; since the cedars have been removed.

Q. Is that territory well adapted to the growth of apples?

A. Yes, sir; I think so.

Q. Has the production or growth of cedar in that territory been done in any way on a commercial basis?

A. No, sir; I don't think so.

[fol. 125] Cross-examination.

By Mr. Dechert:

X. Cedar trees have been sold in that community, haven't they?

A. I don't know, sir, that they have.

X. Have they been used at all there?

A. Poessibly some have been used for posts.

X. Make shingles out of the-, don't they?

A. Not that I know of, sir.

X. Make cedar boxes or chests out of them, don't they?

A. There have been some cedar boxes made in Eastern Virginia. I don't know of any in this section.

X. They can be utilized that way?

A. They make very nice chests.

X. They add very much to the appearance of the place on which they grow, don't they?

A. That depends on what a man thinks about it.

X. You say that your orchard is four or five miles from the Julia V. Miller land?

A. Yes, sir.

Witness stood aside.

HENRY BAILEY, sworn, examined by Judge Tavenner, testified:

Q. Mr. Bailey, what is your occupation?

A. I do a little farming.

Q. Have you engaged in the nursery business in the past?

A. I was several years ago, but not at present.

Q. What official position do you hold with the State Government?

A. I have been doing some inspection of nursery stock, and also looking after some cedar cutting.

Q. You have been employed by the State Entomologist?

A. Yes, sir.

Q. Have you had occasion to examine the Julia V. Miller property recently?

[fol. 126] A. Yes, sir; I have been there several times in the last three months.

Q. What condition did you find the cedar trees in with reference to cedar balls?

A. I did not look on every cedar tree, but I found cedar balls on every tree that I examined closely. Some of the balls were very small for this time of the year.

Q. They will develop more towards the spring, you mean?

A. Of course, in the spring when the weather is favorable they will develop more. If you want to know something about the size of them today, there are a great many of them that size (producing a cedar ball).

Mr. Dechert: Have you a microscope with you?

Witness: No, sir; I can see that with my naked eye.

Mr. Dechert: That is a peanut, isn't it?

Witness: Taste it and you will see whether it is a peanut or not.

Q. What measurements have you made as to the distance of these cedar trees to nearby orchards?

A. I helped to make a measurement from Mr. Hottle's orchard on the west side of this ridge. The orchard is on

the east side of the cedars north of the barn, and the distance was 4,151 feet.

Q. Will that include all the cedars on the Julia V. Miller property?

A. We went across the cedars north of the barn, and I judge from the looks of it that it would take in all the cedars that are in Shenandoah County within one mile of the Hottel orchard, on the Miller farm.

Q. With what did you make your measurement?

A. With a 100-foot tape line.

Q. Now, are there any other small orchards in the vicinity of that property?

A. Oh, yes. We did not measure from any other orchard, but there are four or five orchards that we could see from this ridge—small orchards.

Q. Are they within a mile of these cedars?

A. Yes, sir, some are within a mile.

Q. Do you remember a small orchard across the Valley pike?

[fol. 127] A. Yes, I remember that orchard east of the Valley pike; and then there is one on the west side of the Valley pike.

Q. Within what distance of these cedars?

A. Judging just by the eye, I would think it was within a mile of these cedars.

Q. Do you know the location of the Walden orchard?

A. Yes, sir.

Q. About what distance is that orchard from the Miller cedars?

A. That may be a fraction over a mile. It might come within a mile, but I am not sure.

Q. What is the size of the Walden orchard?

A. I wouldn't know, but it must run beyond 25 acres.

Cross-examination.

By Mr. Dechert:

X. The owner of the Hottle orchard has not attempted to treat it in such manner as to make it a profitable enterprise to him; he has not sprayed the trees, for instance, has he?

A. I can't say for that, what he has done.

X. You mean you do not know whether he had done it or not?

A. I don't know whether he ever sprayed or not.

X. Can't you tell when an orchard has been attended to?

A. I can tell when an orchard has been sprayed along through the summer and spring.

X. Did you ever see that orchard sprayed in the spring or summer?

A. I went by there several times in a car, but never noticed whether it was or was not.

X. Do you know whether he has ever attempted to use it to raise apples for market?

A. I don't know what he did with it; whether he did or whether he didn't.

Witness stood aside.

W. J. Schoene, recalled by Judge Tavenner, further testified:

Q. Mr. Schoene, have you made any measurements to [fol. 128] ascertain the distance from the Miller cedars to any of the orchards other than the Driver orchard?

A. Only the Hottle orchard. I was with Mr. Bailey this morning when the measurement was made. I carried one end of the tapeline.

Q. Will you state what sort of measurement you made?

A. We measured in a direct line from the fence surrounding the Hottel orchard to the fence, which is about even with the barn and runs along the top of the ridge, that is, parallel with the fence on top of the ridge, and it is the distance that Mr. Bailey mentioned, 4,151 feet; and a mile, according to that distance, would take in all the cedars on the ridge that are in Shenandoah County very easily, in the mile radius.

Q. The Hottel orchard is about what size?

A. I judge it is two and a half acres. All that I know about the orchard is what Mr. Hottel wrote me. He said his taxes were $7.50. You can tell something of the size by that.

Mr. Dechert: What else did he say. He said he didn't want those cedars interferred with, didn't he?

Witness: Mr. Hottel told me he thought he ought to have protection if he had to pay the tax.

Q. He objected to paying the tax, didn't he?

A. He did not like the idea of paying the cedar tax without having the cedars cut.

Q. He wasn't in favor of paying a cedar tax when it was not doing him any good?

A. No, sir; not much.

Q. Now, Mr. Schoene, about what age apparently are the trees on the Hottel orchard?

A. Perhaps twelve or fifteen years old.

Q. In the event that orchard is properly cared for, can you state whether it ought to be a productive one?

A. Yes, sir; the orchard has the appearance of having been pruned and taken care of.

Q. Can you tell what varieties of apples he has?

A. No, sir; I don't know anything about the varieties in the Hottel orchard.

Q. Apparently, it was a thrifty young orchard?

A. Yes, sir.

Q. What have you to say as to the quality of land in which this orchard is growing, whether it is a type of land likely to produce apples?

[fol. 129] A. I have not examined the land.

Q. You know the general type of the soil in that territory?

A. Yes, sir, in a general way only.

Q. Is it limestone, or what type of land?

A. It may be limestone, but I don't know whether it is or not.

Q. Now, are there any other orchards there in the locality, small orchards?

A. Yes, sir; there are four or five small blocks of trees within a mile of these cedars.

Cross-examination.

By Mr. Dechert:

X. How many in each place?

A. There is a small block of trees on the east side of the Valley pike which, I should say, is within three-fourth of

a mile of the top of the ridge, and certainly within a mile of all these cedar trees.

X. How many trees are in that orchard?

A. I don't know.

X. About?

A. I did not count the trees and don't know.

X. Can you give some estimate of them?

A. I noticed a nice little block of trees there, certainly enough to produce all the apples a man would need to pay his cedar tax if the cedars were cut down. He would have enough for his domestic use and to sell to pay his cedar tax.

X. About what would be the cedar tax on that orchard?

A. If it is in Shenandoah County it would be $3.00 an acre.

X. How many acres in it?

A. I don't know.

X. Well, are there any other places?

A. I do not know the names of any of these other orchards.

X. Those you have just spoken of are all of that same small character?

A. Yes, sir, of that small character. There are several of them that are rather conspicuous as you stand on the hill. There is one over on the hill that is an excellent young orchard and has the appearance of having been well cared for, which is within a mile—it is just within or just without the mile; certainly it is close to a mile of the edge of these cedars.

X. These little places you do not think can properly be treated as commercial orchards, do you?

[fol. 130] Well, if the cedars in that neighborhood were removed these small orchards would become an asset to the farms on which they are located.

X. You mean that it would produce apples that a man could consume?

A. They would produce apples for the people that live in that neighborhood, instead of producing apples now which are about the size of walnuts, which are not commercial apples.

X. Do you know anything at all about their production at this time?

A. No, sir.

X. You do not even know the varieties of apples in the orchard?

A. No, sir.

X. It is only while the cedar balls are green that they are capable of diffusing these spores, isn't it?

A. Only while the cedar balls are what?

X. Green, and by green I mean while they are alive?

A. Certainly.

X. What is the life of a cedar ball?

A. I suppose about six months, perhaps, from the time it is first visible at all.

X. After which the sporadic activities cease?

A. Yes, sir, in about six months, I guess.

X. That cedar ball is not capable then of diffusing these spores afterwards?

A. That is what I understand.

X. When you testified on yesterday that on most of the cedar trees you examined on the Miller place you found cedar balls, did you mean those that had dried up and were no longer capable of diffusing the spores, as well as those which were alive, or not?

A. I meant that the cedar balls I had reference to were living cedar balls. I also saw on some of the trees small number of dead cedar balls, that is, balls which had remained over from previous years.

Direct examination resumed.

By Judge Tavenner:

Q. Mr. Schiene, you stated that the cedar balls perish in about six months after they became visible; can you not state a little more definitely about what time they perish? [fol. 131] A. That depends somewhat on the weather. If, during the spring, there occur a series of short wet spells in succession, sometimes these cedar apples continue to discharge spores at each wet spell for six or eight weeks, starting about the time that they usually appear when the little leaves are from a half to three-fourths of an inch

long. On the other hand, if the weather happens to be dry, these cedar balls do not function, but dry up.

Q. Mr. Schoene, those spores that are emitted from the cedar balls are emitted beginning about what time of the year?

A. In May.

Q. What is the condition for that?

A. A nice long rain like we are having out of doors now of several hours' duration.

Q. A warm rain?

A. Yes, sir, a warm rain is necessary.

Q. What effect does a warm rain have upon these cedar balls?

A. The balls absorb the moisture and the spores are developed, and immediately the rain stops these spores are discharged into the air.

Q. As the atmosphere begins to dry these genatinous spores begin to dry and are carried off into the atmosphere?

A. Yes, sir.

Q. The cedar balls while they are on the tree now in a green state, do they do any injury to the apple tree?

A. Not now; no, sir.

Q. It is only when these gelatinous spores are carried off into the atmosphere that they injure the orchard?

A. Yes, sir.

Q. And that continues until the cedar balls are exhausted?

A. Yes, sir.

Mr. Dechert: They absolutely work themselves to death?

Witness: Yes, sir.

Q. Mr. Schoene, do you know anything of the productivity, or productive value, of the York Imperial tree properly grown?

A. Yes, sir.

Q. Do you know about what is the capacity of a well-grown York Imperial tree?

A. Of course, that all depends upon the size of the tree, [fol. 132] its age, etc., but a mature tree usually bears ten to twenty barrels of apples.

Q. And has the market for apples in the last few years, or has it not, generally, been good?

A. For number ones, yes, sir. But it has not been good for York apples that show evidence of cedar rust.

Q. Have you any way of telling, on a commercial basis, what two acres of orchard properly cared for will produce to the farmer?

A. Well, he ought to get anywhere from three to five hundred dollars an acre out of it.

Q. In other words, Mr. Schoene, would 150 barrels of apples to an acre of good orchard be an unreasonable yield?

A. No, sir. It would be a very ordinary yield if the season is good and the trees have a good crop.

Q. In other words, properly cared for, that two acres of orchard might easily yield M. Hottel more money than his farm?

A. I don't know about that. I am not familiar with his farm.

Q. I mean, the way farming operations are being conducted there?

A. I am not familiar with his farm, but it certainly would give him a nice sum, enough to pay the cedar tax he is complaining of.

Q. And bring in enough to pay the expenses of operating his farm?

A. Yes, sir.

Witness stood aside.

Judge Tavenner: I wish to treat the A. S. Miller will as in the record. I presume it will not be necessary to read it.

Mr. Dechert: All right, if you want it.

Judge Tavenner: That is all. We rest.

Testimony for the Defendants

This being all the evidence introduced or offered to be introduced on behalf of the State Entomologist, to maintain the issue on his behalf; thereupon the defendants offered the following testimony:

G. L. Minnick, sworn, examined by Mr. Bennick, testified:

[fol. 133] Q. Mr. Minnick, where do you live?

A. New Market.

Q. And you are living where, now?

A. On Dr. Miller's place.

Q. You live on the land on which the cedars in controversy are located?

A. Yes, sir.

Q. You are familiar with the Miller land and the cedars thereon?

A. Yes, sir.

Q. Did you ever make any estimate of the number of cedars on this land?

A. No, sir; I never counted them.

Q. Do you know about how many there are along the road leading from the pike to the house?

A. I think, something like 175.

Q. Do you know about how many cedars there are in the pasture field, small cedars, or can you give some estimate of them?

A. Well, I suppose there would be several thousand of them.

Q. How many acres are there?

A. I suppose, about twenty-some acres.

Q. About what size are the cedars on these twenty acres from the smallest to the largest?

A. From six inches to six feet high. Some nearly as high as I am.

Q. A number of them are big enough for what is ordinary used as family Christmas trees, are they not?

A. Yes, sir. A good many.

Q. What is the condition of the cedar trees along the road from the house down to the pike, are they all branches and bushy, or well-kept, or how?

A. They are well-trimmed.

Q. Now, what is the condition of the larger trees back of the barn there?

A. They are all well-trimmed.

Q. All well-trimmed?

A. Most of them.

Q. All are well-trimmed that are of any size?

A. Yes, sir.

Q. How about those up there southwest of the house towards the county line?

A. They are not so large, but a good many of those are trimmed but not as high as the larger ones.

[fol. 134] Q. They are trimmed, though?

A. Some of them are, a good many of them have been.

Q. Of course, I mean only those that are in Shenandoah County, up towards the Rockingham County line. That is the way you understood my questions?

A. Yes.

Q. Have you any idea about how the quality of the timber, whether those trees of any size are a good quality of tree, or not?

A. Well, I think they are good quality.

Q. Have you ever cut any of those down yourself?

A. Yes, sir.

Q. For what purpose?

A. Posts.

Q. Cedar makes very good posts, does it not?

A. Yes, sir.

Witness stood aside.

C. W. Cushman, sworn, examined by Mr. Bennick, testified:

Q. Mr. Cushman, where do you live?

A. New Market.

Q. You have been living there all your live?

A. Yes, except what time I was at Dr. Miller's.

Q. How old were you when you left there?

A. I was eighteen.

Q. How old were you when you went out there?

A. Nine years old.

Q. Do you remember or are you familiar with the trees that were on that land?

A. Yes.

Q. Do you know anything about the care that was taken of them?

A. Yes.

Q. Tell us what you know about that?

A. All the underbrush was cut off and just the tops left. They were trimmed up nicely.

Q. What are the condition of these cedars, so far as you know it; did they make good cedar trees, or were they indifferent?

A. Yes, now. At first, before they were trimmed they were brushy and looked bad, but now they are an ornament.

[fol. 135] Q. How long has it been since you left there?

A. I went there in 1871, and left there in 1879.

Q. And the great bulk of the cedars were there then, were they?

A. Yes, sir.

Q. How about those up and down the pike, or the road there, I mean?

A. They were just small when I went there, quite small brushes.

Q. You have observed those cedars during the years since that time, haven't you?

A. Yes, sir.

Q. What condition are they, now?

A. Nice condition, now; they are trimmed up nicely.

Q. Do you know anything about the cedars in the field back of the barn?

A. Yes, sir; some.

Q. Were they trimmed up when you went there?

A. No, after I went there.

Q. While you were there, they were trimmed up?

A. Yes, sir.

Q. And your observation is that they have been kept trimmed up, have they?

A. Yes, sir.

By Judge Tavenner:

X. I will ask you one question: How large were those cedars along the road when you first went there?

A. I suppose, possible, that high, possibly. (Indicating 5 or 6 inches.)

Witness stood aside.

J. E. Bushong, examined by Mr. Dechert, testified.

Q. Where do you live, sir?

A. Mile north of New Market.

Q. Have you had any experience in marketing cedar trees?

A. Yes, sir.

Q. When did you have that experience, in marketing them—selling them?

[fol. 136] A. I taken some to Washington this last Christmas. I shipped a carload of 5 or 6 hundred to Washington. Then I sold some in Washington this last Christmas.

Q. Did you find them readily salable?

A. Yes, sir.

Q. What price did you get for them?

A. The truck load I took down there was around 200, and I wholesaled them at 75¢ a piece as soon as I got there. The next load was 260 and I staid there and retailed them, and they ran anywhere from fifty cents to two dollars apiece.

Q. Depending upon the size?

A. Yes, sir.

Q. How much did you make out of that truck load?

A. Clear of expenses?

Q. Yes.

A. The first load I cleared free of expenses $100.00; the last load I had a good deal more expense than the first one, and I cleared around $100 as my profit clear of all expense.

Q. Could you have sold more if you had them?

A. Yes, sir. I had an order for 10 and 18 foot trees, at $30.00 a piece, but I couldn't get them there.

Q. There are such trees growing up there?

A. I had them myself, not myself but on my uncle's land up there, but I did not have time to get those to Washington.

Witness stood aside.

JOSEPH H. FRAVEL, sworn, examined by Mr. Dechert, testified:

Q. You live here in Woodstock, Mr. Fravel, don't you?

A. Yes, sir.

Q. How long have you been living here?

A. Nearly all my life.

Q. Are you familiar with farming land and its prices in this country?

A. I am familiar with some of it.

Q. Do you know this Julia V. Miller land that is involved here?

A. Yes, sir.

[fol. 137] Q. Are you familiar with the growths of cedars on that land?

A. Yes, sir; I am familiar with the growth of cedar there.

Q. Will you state whether or not you are in a position to know what would be the difference in the value of that land, that farm, with and without the cedars?

Judge Tavenner: I object.

Mr. Dechert: My question is based upon the proposition that the true measure of damages is the difference in the market value of the land before the cedars have been removed and after they have been removed.

The Court: I sustain that objection. The land owner is not entitled to any damage at all to his land, but I have always allowed him something for the injury that may be sustained by reason of going over his land in cutting the cedars. I have always thought it but reasonable and fair that the land owners should have compensation for his time in supervising the work done by the State Entomologist to see that work of removing the cedars is carried out according to the court's order.

Mr. Dechert: The object of this question is to show that the difference in the value of the farm before and after the removal of the cedars will be not less than from five to seven thousand dollars which will be lost to the owners by the removal. Your Honor rules that you will admit no evidence of that character?

The Court: Yes, sir.

Mr. Dechert: We note an exception to the ruling.

Q. Do you know whether these cedars have any marketable value?

A. Oh, yes, sir.

Q. What is it?

A. As lumber and for Christmas trees.

Q. About what is the value of a cedar tree?

[fol. 138] A. Well, of course, it depends upon what you can get out of it.

Q. Well, such cedar trees as are on this place of Mrs. Miller's. You say you know them?

A. There are some trees there that will make a good bit of lumber, and that lumber today is kind of beyond our pocket-book to buy.

Q. What is the range of the value of them?

A. Put into lumber, about sixty dollars, I guess, would have to be paid today, per thousand.

Q. How many trees would it take to make that much lumber?

A. That would depend, of course——

Q. Such trees as are here, I mean.

A. That depends on the size of the tree, now.

Judge Tavenner: Ask him if he has his tree-book.

Witness: No; I haven't my tree-book.

Q. How many do you say, about?

A. It depends, of course, on the size of the tree. Some men would put into lumber trees that would make posts.

Q. What about the average of such trees as are on this place; how many would it take?

A. From some of those trees, I suppose, you could get 100 feet out of three of them; some, probably, would take five, others would take six; and some of them would take twenty to make 100 board feet.

Cross-examination.

By Judge Tavenner:

X. Mr. Fravel, you have been very much opposed to the enforcement of the cedar rust law in the county have you not?

A. Yes, sir; I have been.

X. You had ten dollars worth of cedars cut on your place once did you not?

A. A few more than that.

X. That was the cause of your feeling against the enforcement of that law?

[fol. 139] A. No.

X. You volunteered your services at numerous times to thwart the enforcement of the cedar rust law, have you not?

A. No, not exactly, I haven't volunteered my services. I was just opposed to having the trees cut.

X. You are not only opposed to the enforcement of that law, but you have become very bitter to all orchardists, have you not?

A. No, sir; I have no resentment.

X. Any one that has had anything to do with it, you have taken as a mortal offender.

A. I have lots of orchardists that are my friends—lots of them.

X. For a long time you wouldn't even furnish material from your mill to those who were attempting to enforce that law.

A. Yes, I have furnished it to lots of people.

Mr. Dechert: Some of them may not have been prompt pay?

Witness: That was the great trouble with lots of them. I had to threaten to sue some of them to get my money.

X. When did you go up and examine the property?

A. I think the first week in March, 1925.

X. At whose instance?

A. I was asked to come up there by Mr. Miller.

X. How many trees did you find on the property that were over six inches in diameter?

A. I was only there about an hour and a half and it would be hard to give any number. We did count the trees just roughly in front of the house, and we found there, in round numbers, about two hundred trees.

X. Of what size?

A. They were probably five, six and some eight inches.

X. How much lumber will one of those trees six inches in diameter make? Do you saw into lumber trees smaller than six inches?

A. They had not been heretofore, but this mill at Edinburg has sawed trees as small as four inches. I do not know what they made out of them.

X. One of those trees six inches in diameter would make how many sawed feet, board feet?

[fol. 140] A. A six inch tree, squared to four inches would make an 8 ft. stock, and that would make about 12 feet. You would get that much lumber out of a stock that size as near as I can judge.

X. How many sticks that size would they get from a tree that measured six inches in diameter, more than one cut?

A. Some of them would make more than one cut.

X. Where was there any market this year for Christmas trees?

A. I did not go to the city this year about the market for Christmas trees, but I have been there at the Lexington market, in Baltimore, and at the Gay Street market, and I have been in Pittsburg at those markets, and there was ready sale for them in those places.

X. How many have been shipped out of this county in 1925?

A. I don't know. I am not in the Christmas tree business.

X. Do you know of any?

A. Yes, I know of several that Mr. David Clem up here furnished.

X. I am talking about by the carload.

A. I don't know anything about that. I am talking about trees.

X. You know of a couple of trees that have been sent out by express?

A. Yes, sir.

C. O. Miller, sworn, examined by Mr. Dechert, testified:

Q. You are Dr. C. O. Miller?

A. Yes, sir.

Q. You live near New Market, in Shenandoah County?

A. Yes, sir.

Q. You are one of the defendants in this case, since the stipulation of Counsel?

A. Yes, sir.

Q. You and your sister own the fee simple title to the small tract or strip of land referred to this morning?

A. Yes, sir.

Q. And in the remainder of the farm after the expiration of your mother's life tenancy?

A. Yes, sir.

[fol. 141] Q. Now, Doctor, will you tell the Court what will be the difference in the value of these lands after and before the cedars are cut from them?

Objection, sustained, exception for defendant.

Mr. Dechert: It is expected to prove by the answer of this witness that the value referred to is from five thousand to seven thousand dollars, which will be lost to the defendants.

Q. Will you state your reasons for the opinion which you have just failed to express?

Objection, sustained, exception for defendants.

Q. Doctor, state whether or not the trees bordering the driveway into your home are of special value because of their ornamental character?

A. I consider them so.

Mr. Dechert: Wait until Judge Tavenner makes his objection.

Judge Tavenner: I don't think I will object to that part of it.

Q. All right, Doctor.

A. I consider them of special value from a scenic standpoint, and from the standpoint of what the farm would bring if I would sell it.

Q. How much do you think those trees bordering that driveway into your home add to what would otherwise be the value of the farm?

Objection, sustained, exception for defendant.

Witness stood aside.

T. W. ALLEN, sworn, examined by Mr. Dechert, testified:

[fol. 142] Q. Where do you live, Mr. Allen?

A. I live at Red Banks, I suppose you know where it is.

Q. In Shenandoah County?

A. Yes, sir.

Q. That is north of Mt. Jackson, between Mt. Jackson and Edinburg?

A. Yes, sir.

Q. How far do you live from New Market?

A. Ten miles and a half from New Market.

Q. Do you know the Julia V. Miller land as to which this controversy relates?

A. Yes, sir.

Q. And the cedar trees on it?

A. I have been over it. I have been knowing it all my life.

Q. Are you familiar with the lane of trees on each side of the roadway leading into Dr. Miller's home, and with the groves of cedar trees and other cedar trees on the place?

A. Yes, sir.

Q. Have you made an examination of it with a view to determining the value of the farm and those trees?

A. Yes, sir.

Q. Will you state, Mr. Allen, what in your opinion—(Changing) I will ask you this, first. You are a farmer by occupation?

A. Yes, sir.

Q. How much land do you own or operate?

A. I own about six hundred acres of land.

Q. That you operate yourself?

A. Yes, sir; it has been rented of late years.

Q. But during the most of your life you have been an active practical farmer?

A. For about thirty years.

Q. You are also a stock raised?

A. Yes, sir.

Q. Will you please state what in your opinion is the difference, if any, in the market value of the land referred to in the previous questions with the cedar trees growing as they are upon the place and with the cedar trees removed therefrom?

[fol. 143] Objection, sustained, exception for the defendants.

Teste this — day of Feb., 1926. F. B. Whiting, Judge.

A copy, Teste: Otto V. Pence, Clerk.

[Title omitted]

CERTIFICATE OF EXCEPTION No. 2

"Now, Doctor, will you tell the court what will be the difference in the value of these lands after and before the cedars are cut from them?"

The foregoing question, propounded to Dr. C. O. Miller, a witness on behalf of the defendants, upon direct examination, upon objection thereto by the plaintiff, was disallowed by the court, and the defendants excepted; the answer to the question expected by the defendants was that by the removal of the cedar trees, the market value of the land would be diminished by from $5,000.00 to $7,000.00.

Teste: This 25th day of February, 1926.

F. B. Whiting, Judge.

A copy, teste: Otto V. Pence, Clerk.

[fol. 144] [Title omitted]

CERTIFICATE OF EXCEPTIONS No. 3

"Will you state whether or not you are in a position to know what would be the difference in the value of that land—that farm—with and without the cedars?"

The foregoing question, propounded to Jos. H. Fravel, a witness on behalf of the defendants, upon direct examination, upon objection thereto by the plaintiff, was disallowed by the court, and the defendants excepted; the answer to the question *excepted* by the defendants was

that by the removal of the cedar trees, the market value of the land would be diminished by from $5,000.00 to $7,000.00.

Teste, this 25th day of February, 1926.

F. B. Whiting, Judge.

A copy, teste: Otto V. Pence, Clerk.

[Title omitted]

CERTIFICATE OF EXCEPTIONS No. 4

"Will you please state what, in your opinion, is the difference, if any, in the market value of the land referred to in the previous questions with the cedars growing as they are upon the place, and with the cedars removed therefrom?"

The foregoing question, propounded to T. W. Allen, a witness on behalf of the defendants, upon direct examination, upon objection thereto by the plaintiff, was disallowed by the court, and the defendants excepted; the answer to the question expected by the defendants was that by the [fol. 145] removal of the cedar trees, the market value of the land would be diminished by from $5,000.00 to $7,000.00.

Teste, this 25th day of February, 1926.

F. B. Whiting, Judge.

A copy, teste: Otto V. Pence, Clerk.

IN CIRCUIT COURT OF SHENANDOAH COUNTY

[Title omitted]

JUDGMENT—January 22, 1926

On motion of Mary E. Miller and C. O. Miller by Counsel, they are admitted as defendants to this proceeding.

This day came the parties, by their attorneys, and the defendants filed their grounds of defense set forth in writ-

ing to the notice of plaintiff. After hearing of the testimony both for the Virginia State Entomologist and the defendants it is considered by the Court.

(1) That the Virginia State Entomologist proceed forthwith to carry out and enforce his order for the cutting of the said cedar trees, and that he is hereby ordered and required to cut down and destroy all red cedar trees growing upon the lands described in the said notice of the Virginia State Entomologist, consisting of a tract devised to said Julia V. Miller for life with remainder to C. O. Miller and * * * Miller and consisting in part of a tract conveyed to C. O. Miller, the said real estate being situated in Lee District of Shenandoah County and containing in the aggregate about 155 acres.

(2) That the said defendants be awarded the sum of $100.00 in satisfaction of damages accruing to them by reason of the cutting and removal of the said cedar trees directed in this cause to be cut and removed, and this sum it is ordered, shall be paid to the said defendants before the work of the cutting of said cedar- shall proceed.

[fol. 146] The court in determining the amount of damages which will be incurred by the defendants in case the cedar trees are detroyed, did not determine the amount according to the doctrines applicable to the taking of land under the statutes of eminent domain, but followed the rules of decision beginning with the judgment of the late Judge Turner in the case of Virginia State Entomologist v. Glass, decided in the Circuit Court of the County of Frederick in the year * * *, and of a very large number of cases decided by this court, including the case of Virginia State Entomologist v. Bowman, from which an appeal was taken to the Supreme Court of Appeals of Virginia, and Virginia State Entomologist v. Funkhouser, and same against Filtzmoyer, from which last two decisions an appeal was ineffectually sought. This Court in construing the Act, and especially sections 885, 886, 887 and 891, is of the opinion that the damages in contemplation of the Act are such damages to the land only as would be incurred by the defendants incident to and resultant from the cutting of the cedars, including reasonable compensa-

tion to the cedar tree owner for supervision while the work of cutting and destroying the cedars was being done, and that it was not in contemplation of the Act that the cedar tree owner, in case his cedars were a public nuisance, should be compensated in face of his refusal to obey the order of the Entomologist, on the basis of recovery for taking or damaging property under the statutes of eminent domain.

But the Court is of the opinion that the Legislature only contemplated by this Act that the County and ultimately the orchardists, should pay the costs of destroying the trees, and the actual damage done the premises from which the cedars are removed by the work necessary to be done to destroy the trees and clear off the land, the owner to get the trees and wood for his own use, this damage to include compensation for injuring the sod and for interrupting and interfering with the use and enjoyment of the land, and any resultant injury due to the acts of cutting and destruction of the said cedar trees.

[fol. 147] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 148] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

PETITION FOR WRIT OF ERROR

To the Honorable Robert R. Prentis, President of the Supreme Court of Appeals of Virginia:

Now come Julia V. Miller, Ada V. Miller and C. O. Miller, petitioners herein and plaintiffs in error, and represent that on the 18th day of November, 1926 (re-hearing denied January 24th, 1927), a final judgment was duly entered by the Supreme Court of Appeals of Virginia affirming the judgment entered by the Circuit Court of Shenandoah County, Virginia, in a certain proceeding wherein W. J. Schoene, State Entomologist, was plaintiff and your petitioners were defendants.

The proceeding in which said judgment was entered was inaugurated by said State Entomologist under and in pursuance of an Act of the Legislature of Virginia known as the Cedar Rust Law, approved March 4th, 1914 (Acts of 1914, page 49), and incorporated in the Code of Virginia, 1919, Sections 885 to 893 inclusive, as amended March 16th, 1920 (Acts of 1920, page 349), by a notice requiring your petitioners, within a time specified therein, to cut down and destroy all of the red cedar trees growing upon a tract of two hundred and twenty-five acres of land in said Shenandoah County owned by them, on the ground that said [fol. 149] trees were growing within two miles of an apple orchard and constituted a menace to said orchard. The validity of said statute was denied and drawn in question by your petitioners in the Circuit Court and in this Court, on the ground of its being repugnant to Section I of the Fourteenth Amendment of the Constitution of the United States, and in contravention thereof; but this Court decided against the Federal claim thus set up, and held that said law was constitutional and valid.

Your petitioners aver that in the aforesaid judgment and proceeding certain errors were committed to the prejudice of your petitioners, all of which will more fully appear from the assignment of errors which is filed herewith.

Wherefore your petitioners pray that a writ of error from the Supreme Court of the United States may issue in this case to the Supreme Court of Appeals of Virginia, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in the cause, duly authenticated by the Clerk of the Supreme Court of Appeals of Virginia, may be sent to the Supreme Court of the United States, as provided by law.

Dated this 9th day of February, 1927.

Randoph Harrison, Attorneys for Petitioners and Plaintiffs in Error.

[fol. 150] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

ASSIGNMENTS OF ERROR

Now come Julia V. Miller, Ada V. Miller and C. O. Miller, petitioners and plaintiffs in error, by their attor-

neys, and in connection with their petition for a writ of error show that in the record and proceedings, and in the rendering of the judgment and decision of the Supreme Court of Appeals of Virginia in the above case, manifest error has intervened to the prejudice of these petitioners and plaintiffs in error.

The said errors are more particularly set forth as follows:

The Court erred in holding that the Act of the Legislature of Virginia known as the Cedar Rust Law, approved March 4th, 1914 (Acts of 1914, page 49), and incorporated in the Code of Virginia, 1919, Sections 885 to 893 inclusive, as amended March 16th, 1920 (Acts of 1920, page 349), under and in pursuance of which the defendant in error claimed the authority to order the destruction of the red cedar trees in his said notice mentioned, was not repugnant to Section I of the Fourteenth Amendment of the Federal Constitution, and void,

First. In that it deprived your petitioners of their property without due process of law;

Second. In that it denied to your petitioners the equal protection of the law;

[fol. 151] Third. In that said statute is an unwarranted and arbitrary interference with the rights of your petitioners to use and enjoy their property;

Fourth. In that it amounts to the taking of the property of your petitioners for the benefit of private owners of apple orchards;

Fifth. In that said statute, by its own terms, is inoperative as to any particular territory or locality unless and until ten or more freeholders have requested the Entomologist to examine the cedars of such locality and ascertain whether any of them, within two miles of an apple orchard, are infected with cedar rust, and upon discovery of such infection to destroy them; and

Sixth. In that said statute, upon its face, is too uncertain and indefinite to permit of its enforcement, neither the term "locality" nor the term "orchard" therein employed being thereby defined, and the same not being terms of

definite or ascertainable meaning as commonly employed, nor having any technical or legal meaning.

By reason whereof your petitioners and plaintiffs in error pray that the said judgment of the Supreme Court of Appeals of Virginia may be reversed, and a judgment rendered in their favor, and for costs.

Dated this 9th day of February, 1927.

Randolph Hanison, Attorneys for Petitioners and Plaintiffs in Error.

[fol. 152] In Supreme Court of Appeals of Virginia

[Title omitted]

Order Allowing Writ of Error

On reading the petition of Julia V. Miller, Ada V. Miller and C. O. Miller for writ of error, and the assignment of errors, and upon due consideration of the record of said case, it is ordered that a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of Appeals of the State of Virginia, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that the said petitioners and plaintiffs in error shall prosecute said writ of error to effect, and if said plaintiffs in error fail to make their plea good they shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiffs in error now presenting a bond in the sum of $1000.00 executed by C. O. Miller, as principal, with Mary C. Miller as surety, it is ordered that the same be, and hereby is approved.

In Witness whereof I have hereunto set my hand this the 9th day of March, 1927.

Robert R. Prentis, President Supreme Court of Appeals of Virginia.

[fol. 153] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of Virginia, Greeting:

Because of the record and proceedings, and in the affirmance of a judgment of the Circuit Court of Shenandoah County, Virginia, as also in the rendition of the judgment of a plea which is in the said Court before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Julia V. Miller, Ada V. Miller and C. O. Miller, plaintiffs in error, and W. J. Schoene, State Entomologist, defendant in error, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity; a manifest error hath happened, to the great [fol. 154] damage of the said Julia V. Miller, Ada V. Miller and C. O. Miller, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and procedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 9th day of March, 1927.

L. T. Hyatt, Clerk of the United States District Court for the Western District of Virginia. (Seal.)

Allowed: Robert R. Prentis, President of the Supreme Court of Appeals of Virginia.

[fol. 155] Citation, in usual form, showing service on Jno. R. Saunders omitted in printing.

[fol. 156] Bond on writ of error for $1,000 approved; omitted in printing.

[fol. 157] Certificate of Lodgment omitted in printing.

[fol. 158] Return to writ of error omitted in printing.

[fols. 159 & 160] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the clerk of the above-entitled court:

You are hereby requested to make a transcript of the record of this case, to consist of,

1. The record on appeal in said case;

2. The opinion of the Supreme Court of Appeals of the State of Virginia;

3. All orders contained in the records and proceedings of the Supreme Court of Appeals of the State of Virginia relating to said cease;

4. The final judgment and decision of the Supreme Court of Appeals of the State of Virginia;

5. Your certificate to the record that it is a complete record in said case.

Randolph Hanison, Attorney for Plaintiffs in Error.

Dated this 3d day of February, 1927.

[fol. 161] Submission of cause September 28, 1926, omitted in printing.

[fol. 162] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

OPINION—November 18, 1926

BURKS, J.:

This is a proceeding under the "Cedar Rust" statute, to cause the destruction, as a nuisance, of certain red cedar trees on the lands of the plaintiffs in error. Sections 1, 2 and 9 of the original act (Act 1914, p. 49), carried into the Code as Sections 885, 886 and 893, are given in the margin 1.

[fol. 163] "Sec. 885. Red cedar trees; public nuisance.—It shall hereafter be unlawful within this State for any person, firm of corporation to own, plant or keep alive and standing upon his or its premises, any red cedar tree, or trees (which are or may be) the source, harbor or host plant for the communicable plant disease commonly known as 'Orange' or 'cedar rust' of the apple, and any such cedar trees, when growing within a radius of one mile of any apple orchard in this State, are hereby declared a public nuisance and shall be destroyed as hereinafter provided, and it shall be the duty of the owner or owners of any such cedar trees to destroy the same as soon as they are directed to do so by the State entomologist, as hereinafter provided."

"Sec. 886. Investigation by State Entomologists; when trees to be destroyed; notice to owner.—In any county in this State where the above mentioned disease exists, or there is reason to believe it exists, it shall be the duty of the State Entomologist, in person or by an assistant, upon the request in writing of ten or more reputable freeholders of any county or magisterial district, to make a preliminary investigation of the locality from which said request is received, to ascertain if any cedar tree or trees in said locality are the source of, harbor or constitute the host plant for the said disease known as 'orange' or 'cedar rust' of the apple, and constitute a menace to the health of any apple orchard in said locality, and that said cedar tree or trees exist within a radius of two miles of any apple orchard in said locality. If upon such preliminary investigation of the localities from which said request is received it shall appear that there are cedar

The cedars sought to be destroyed grow wild, mostly on grazing lands, and are not propagated for commercial purposes. They vary in height from mere sprouts to shrubs or trees six or eight feet high and some of them much higher. The smaller ones are used to some extent for "Christmas trees". The chief use of those of sufficient size is for fence posts. Their utility or commercial value is comparatively small. The evidence tends to show that the land is more valuable without them than with them; but, when properly trimmed and kept in order, they possess, or are supposed to possess, a scenic value. They are, however, the deadly enemy of certain very valuable commercial apples, so deadly that one or the other must go, as no prac- [fol. 164] tical method has been discovered whereby the cedar may be treated so as to render it innocuous. Many millions of dollars have been invested in commercial apple orchards in the State, and the industry has been developed to such an extent that the State stands third or fourth in the United States in the production of commercial apples. This development has been especially marked in the Valley and Piedmont sections, and it is said that the Valley alone had a normal annual production of about a million and a

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trees which constitute the source, harbor or host plant of said disease, and that said cedar tree or trees exist within a radius of two miles of any apple orchard or orchards in said locality and constitute a menace to the health of said apple orchard or orchards, the State Entomologist or his assistant, shall give notice in writing to the owner or owners of said cedar tree or trees to destroy the same; such notice shall contain a brief statement of the fact found to exist whereby it is deemed necessary or proper to destroy said cedar trees and call attention to the law under which it is proposed to destroy said cedar trees, and the owner or owners shall within such time as may be prescribed in such notice by the State Entomologist cut down and destroy said cedar trees."

"Sec. 893. How the eight precedding sections put in force in counties and magisterial districts.—The eight proceeding sections shall not be in force in any county or in any magisterial district of any county until the board of supervisors thereof shall by a recorded vote accept and adopt the same for their county or magisterial district in their county, and such acceptance and adoption shall not make the same operative unless the circuit court of such county by an order duly entered shall ratify and approve the action of the board.

"In the event the board of supervisors of any county neglect or refuse to accept and adopt the same for their county, or for any magisterial district of their county, then the majority of the qualified voters of said county or any magisterial district of said county, may request its adoption by petition addressed to the circuit court of said county, and when it appears from said petition that a majority of the qualified voters of said county or any magisterial district of said county request the adoption of said sections, then the said court shall declare the same adopted for such county, or for any magisterial district in such county, requesting their adoption."

quarter barrels. These orchards, while especially valuable to the owners, furnish employment to a large number of laborers, and others.

It appears from the testimony that the cedars in question are within one mile of several orchards. Other facts will appear from the discussion which follows.

The constitutional validity of this statute was assailed in Bowman v. State Entomologist, 128 Va. 351, 12 A. L. R. 1136. In a very lucid and exhaustive opinion by the late Judge Sims, every objection raised to the statute was satisfactorily answered, and the statute was upheld and enforced. The same objections and some others have been raised in the instant case. So far as the facts of the two cases are the same, the Bowman case stands until reversed. [fol. 165] All objections to the constitutionality of the statute are concluded by the Bowman case, whether brought to the attention of the court in that case or not. This must be so of necessity for if a statute is unconstitutional for any reason it is a void statute, and "whenever a statute is enforced by a judgment or decree of a court, it is a judicial determination that the statute is a valid enactment and is free from all constitutional objections. If unconstitutional for any reason, whether assigned or not, the statute is void." Portsmouth v. Weiss, (June, 1926), 36 Va. App. 497, 501. We must, therefore, regard the assignments of error on constitutional grounds as an application to the court to reconsider its holding in the Bowman case. This we have done most carefully, but see no reason for changing the conclusion reached in that case. Our views and the reasons therefor are so fully set out in the opinion in that case that we deem it unnecessary to do more than to refer to the opinion and say that we adhere to it. The constitutional validity of the statute has also been upheld in Kelleher v. Schoene, 14 Fed. (2d) 341, by the United States District Court for the Western District of Virginia.

In the petition for the writ of error in the instant case, [fol. 166] the assignments of error are summarized as follows:

"1. The failure of the trial court to hold that the provisions of said statute are invalid, because in conflict with the first clause of the Fourteenth Amendment of the Con-

stitution of the United States, in that by an enforcement of said statute petitioners' property will be taken without due process of law.

"2. The failure of the trial court to hold said statute invalid, as opposed to said clause of said amendment, because its enforcement will deny to petitioners the equal protection of the laws; and will contravene the principle inhering in government, forbidding the taking or destroying of private property, not for public use, but for the promotion of the welfare of individuals.

"3. The failure of the trial court to hold that said statute is invalid because of vagueness and indefiniteness;

"4. The failure of the trial court to hold that said statute, because of the provision thereof whereby it is to become operative as to any particular locality, by virtue of the action of ten or more freeholders, is void, because in conflict with said provision of the Fourteenth Amendment of the Federal Constitution guaranteeing to all citizens the equal protection of the laws, and inhibiting the taking, or destruc-[fol. 167] tion of property without due process of law;

"5. In holding that there is in force in Lee Magisterial District of Shenandoah County, any law requiring the destruction of any cedar trees;

"6. In holding that, even if the said statute is in force in said county and district, that all of the red cedar trees on petitioners' land are subject to destruction, whereas, in any event no red cedar trees other than such as are or may be source, harbor, or host plants of cedar rust are included in the denunciation of the statute;

"7. In rejecting the evidence tendered by petitioners tending to prove that by reason of the destruction of said cedar trees (if the same be destroyed), petitioners will sustain damage to the extent of from five to seven thousand dollars because of the consequent diminution of the market value of petitioners' land;

"8. In holding that the statute does not require that compensation shall be made to petitioners for any diminution in the market value of their land resulting from such destruction of the cedar trees thereon; or, if the statute does

not provide for such compensation, in holding that the same is not void as in contravention of said first clause of the [fol. 168] Fourteenth Amendment of the Constitution of the United States."

Assignments of error 1, 2, 4 and 8 involving the constitutional questions aforesaid, are fully covered by the decision in the Bowman case, and are overruled.

It is said in the petition for the writ of error that the statute offends the equal protection clause of the Federal Constitution in that it cannot be put into operation except upon the initiative of ten freeholders, and that the court's attention was not called to this feature of unconstitutionality, nor was the case of Eubank v. City of Richmond, 266 U. S. 137, referred to in that connection in the Bowman case. As we have just pointed out, this is wholly immaterial. The statute is the same now in this respect as it was when the Bowman case was decided. But even if our attention had been drawn to the present argument, our conclusion would have been the same. The same point was made in the Kellcher case, supra, and we so fully approve the opinion of the court on that subject that we cannot do better than quote what is there said;

"It is contended that the statute is void because of the provision (sec. 886) in respect to the written request of ten freeholders to the entomologist. Without so deciding, it may be assumed that counsel for plaintiff are right in [fol. 169] saying that such a request is an absolute prerequisite to a notice from the entomologist to the land owners to destroy any cedar tree. However, it does not seem to us to follow that the statute either denies due process of law or the equal protection of the laws. The freeholders are not given any power themselves to order the destruction of cedar trees, nor can they control the entomologist in the performance of his duties, or the circuit court of the county in the exercise of its functions.

"The power given is only that of putting the entomologist under the duty of making or having made an examination. The difference between this power and a power to condemn, or power to require the entomologist to condemn, is most obvious. Hence, we cannot concur in the conclusion of counsel for the plaintiff that the plaintiff's rights are determined by irresponsible individuals. So long as

a request is not signed by ten freeholders the owner of cedar trees remains indisturbed. And the signing of a request does not determine anything except that at least ten freeholders desire than an official search for infected cedar trees be made in some designated territory. The provision in question tends to protect the owners of cedar trees [fol. 170] from possible official overzealousness, as well as the orchardist from the ultimate payment of damages and expenses incurred by the possibly unnecessary destruction of cedar trees. While the provision seems to us wise and beneficent, it is at least harmless in respect to the owners of cedar trees. If it had been omitted, the remainder of the statute being as it is, infected cedar trees, within two miles of an orchard, in a district which has duly adopted the law, would be quite as liable to destruction as they are now. And, if the statute without the provision as to the written request would be constitutional, we are entirely unable to see why the provision in question makes the statute unconstitutional.

"This statute differs so widely from the ordinance involved in Eubank v. Richmond, 226 U. S. 137, 33 S. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192 and from the statutes in the other cases cited by counsel for plaintiff, that we think it profitless to discuss these cases."

The request of the freeholders simply inaugurates a preliminary investigation which, at the instance of the owner of the cedar trees, will result in a judicial trial wherein both sides are allowed to introduce all legal evi- [fol. 171] dence and the court is "authorized to pass upon all question involved." This is not a denial of due process, or the equal protection of the law. After the freeholders have made the request in writing they have not going further to do with the case. The procedure is similar to, and may have been suggested by, the procedure under section 1520 of the Code, where, upon the complaint of five or more citizens of a public nuisance, the court is required to summon a special grand jury to specially investigate such complaint, Jeremy Imp. Co. v. Comth., 106 Va. 482, arose under this statute, and the court assumed, rather than decided, the validity of the statute. The objection to the rul-

ing of the trial court overruling a demurrer to the presentment was waived.

Assignment of error No. 3 is, "The failure of the trial court to hold that said statute is invalid because of vagueness and indefiniteness." This assignment is based on the use of the word "locality" in sec. 886 of the Code hereinbefore quoted. Aside from the fact that this assignment is concluded by the Bowman case, we do not think there is any doubt or uncertainty about the use of the word "locality" in that section. The statute is to be read as a whole, and when so read it is fairly plain that what was to be investigated was the existence of infected red cedar [fol. 172] trees within two miles of an apple orchard, and the entomologist is required "to give notice in writing to the owner or owners of said cedar tree or trees to destroy the same," and that such notice should "contain a brief statement of the fact found to exist whereby it is deemed necessary or proper to destroy said cedar trees and call his attention to the law under which it is proposed to destroy said cedar trees." The location of the cedars and their distance from an apple orchard or orchards is the subject of investigation, and this is the "locality" referred to in the statute. No rights of any one except the owners of the orchards and the cedar trees are involved and these are measured by the statute.

This question was considered by the District Court of the United States for the Western District of Virginia, three judges sitting, in Kelleher v. Schoene, supra, where it is said:

"It is further contended that the indefiniteness of the word "locality", as used in respect to the written request to the entomologist, invalidates the statute. A reasonable construction of the statute as a whole (see sec. 893) requires that the signers of any request to the entomologist must own estates of freeholds in the county, or district, as [fol. 173] the case may be, which has adopted the law, and in which are both the orchard or orchards to be protected and the cedar trees to be examined. While the expression (sec. 886) 'the locality from which said request is received,' is not a happy one, it means merely the locality to which the request relates, and does not mean that the freeholders

who sign must resign in, or must own estates lying in any particular 'locality.' If this is, as we believe, a proper reading of the statute, there is no necessary indefiniteness in the statute, nor does it authorize a request which is in any respect indefinite. The request need not relate to a 'locality' or to any underscribed territory. It can, and should, describe with all necessary accuracy and certainty, either the land to be examined, or the orchard or orchards, within a radius of two miles from which is the land to be examined, and a notice which does not thus reasonably specify the land to be examined could legally be disregarded by the entomologist, or could be successfully attacked by the owner of cedar trees on appeal to the circuit court. As there is no uncertainty of meaning as to who are freeholders of Ashby district, and as the statute does not authorize a request which leaves uncertain the territory to be examined, we think it unnecessary to further discuss [fol. 174] this objection to the statute."

The case of Connally v. Gen. Constr. Co., (Jan. 4, 1926), 46 Sup. Ct. 125, relied on by the plaintiffs in error, is not applicable to the facts in the instant case.

It is assigned as error that the trial court erred "in holding that there is in force in Lee Magisterial District of Shenandoah county any law requiring the destruction of any cedar trees."

The original act was approved March 4, 1914. Section one of this act, (Code sec. 885), declared infected cedars within one mile of an apple orchard to be a "public nuisance." Section two of the act (Code sec. 886) provided for the destruction of such cedars within two miles of an apple orchard. This statute was adopted by the supervisors of Shenandoah county, with the approval of the circuit court of the county, for Lee Magisterial District, in said county, on June 14, 1920. Afterwards, on June 18, 1920, an act approved March 16, 1920, (Acts 1920, p. 370) went into effect. The last mentioned act amended section 885 of the Code, which was section one of the original act, by striking out the word "one" and substituting the word "two," so as to declare a public nuisance infected cedar trees within two miles of an apple orchard.

[fol. 175] The statute contained no repealing clause, and did not alter or amend any other section of the act, as con-

tained in Code, sections 885 to 893, both inclusive. No action was taken by the supervisors after the amendment.

It is argued that the amendment operated as a repeal of the original act, and as the amendment had not been adopted, there was no cedar rust act in force in that district.

Why one mile should have been inserted in the first section of the act, (Code, sec. 885) and two miles in the second section (Code, sec. 886) is a mere matter of conjecture, with which, in our view of the case, it is unnecessary for us to deal. The subject is discussed in Kelleher v. Schoene, supra. It may be observed, however, in passing, that the first section (code sec. 885) appears to be a mere declaration of public policy, declaring the infected cedars within one mile to be per se a public nuisance, and might have been omitted, without impa-ring the completeness and efficiency of the residue of the act.

Whether or not it was necessary for the supervisors to readopt the law after the amendment is also a question we need not answer, as the Hottel apple orchard and also [fol. 176] "four or five small blocks of trees are within a mile of these cedars." Another witness testified on this subject as follows:

"Q. Now, are there any other small orchards in the vicinity of that property?

"A. Oh, yes. We did not measure from any other orchard, but there are four or five orchards that we could see from this ridge—small orchards.

"Q. Are they within a mile of those orchards?

"A. Yes, sir, some *or* within a mile."

There was no evidence to the contrary.

So that, the supervisors having adopted the statute containing the one mile limit in the first section, (Code sec. 885), and there being orchards within the one mile limit, our enquiry is limited to the effect, if any, of the adoption of the amendment.

The object of judicial interpretation of a statute is to ascertain the intention of the legislature, express or implied, as the intent is the vital part of the statute. It is also to be borne in mind that repeals by implication are not favored.

An amendment of a statute operates — a repeal of its provisions to the extent, and only to the extent, that they are [fol. 177] changed by or are repugnant to, the amendatory act. 25 R. C. L. 923, sec. 173.

In the instant case, as above stated, the only change made was the substitution of the word "two" for the word "one" in section 885 of the Code. The remaining sections on the subject were left unchanged. This did not in any way affect or change what had already been done under the original act, but simply extended the area within which thereafter infected cedars should be deemed, per se, a public nuisance. There is no intimation of any other intention.

Counsel for the plaintiffs in error rely upon the Texas cases to support their contention.

In Ex Parte Jank, 245 S. W. 685, a "Tick Eradication" statute containing a local option clause, was approved by a vote of the people in 1919. This statute was held "defective in various particulars; and in 1920 * * * the said law was so amended as to correct the defects mentioned." No vote was taken after the amendment, and Jank was convicted under the amended statute. The court held that Jank "could not be legally convicted under the law as it was when adopted by Lee county at the local option election in 1919, because said law was defective as held in the [fol. 178] Leslie case; and that he could not be prosecuted for acts committed subsequent to the adoption of the 1920 amendment to the statutes above referred to, because the law then had not been put in effect in said county by a new local option election." In other words, what had been adopted was a nullity, and what was valid had not been adopted.

In Ex Parte Ash, (Texas), 279 S. W. 435, a no-fence law against horses, cattle, etc., containing a local option provisions, was adopted by a vote of the people for Comanche county in 1903. The only penalties provided by the statute were damages, fees for impounding, etc., but no fine. In 1907 a statute was adopted relating to horses, cattle, etc., providing "a punishment for a violation of its provision in the shape of a fine." Ash was prosecuted under the latter statute and fined $25. The court held. "The stock laws relating to horses, cattle, &c., as they were upon our statute

books in 1903, when this local option election was held in the precinct under consideration, did not contain any provision punishing those who violated the terms of the law. Neither the relator nor those in his precinct have ever agreed by their vote to submit themselves to a law having such a penal provision in it.

[fol. 179] Of course, they might have voted such a law into effect, but the question is that they did not. Since they did not, we are constrained to follow the path so well outlined by our predecessors and to hold that the relator cannot be prosecuted under the penal provisions which were not in the law at the time it was adopted in said precinct."

The facts of the instant case are so entirely different that they render the cases cited inapplicable. As there are several orchards within a mile of the infected cedars there is no occasion to resort to the amendment extending the limit to two miles. We do not mean to intimate, however, that we would not enforce the amendment if the orchards were beyound the one mile, but within the two miles, limit. It is simply not necessary to decide that question. See discussions of this question in the Kelleher case.

It is assigned as error that the trial court erred, "In holding that, even if such statute is in force in said county and district, that all of the red cedar trees on petitioners' land are subject to destruction, whereas, in any event, no red cedar trees other than such as are or may be sources, harbor or host plants of cedar rust are included in the denunciation of the statute."

[fol. 180] The testimony shows that all red cedar trees in proximity to apple trees may be the source, harbor or host plants of cedar rust. It is not necessary to wait for absolute infection before the cedars may be destroyed. Such a construction would nullify the words "may be" contained in the statute. The propagation and spread of "cedar rust" is well described in Kelleher v. Schoene, supra, as follows:

"Red cedar trees and apple trees of the best commercial varieties are particularly well adapted to the propagation of this disease. The balls which grow on the infected red cedar tree produce in the spring millions of spores, which, when carried by the wind to any one of many most valuable

varieties of apple trees, cause the cedar rust on the fruit and especially on the leaves of the apple tree. This rust produces another spore while on the apple tree. The latter spore, if carried by the wind to an uninfected red cedar tree, infects it, and causes a production on the cedar tree of the cedar balls, which make the first-mentioned spores. The weight of the evidence clearly is that infected cedar trees within two miles of an apple orchard are from the first injurious, and in a few years are fatal, to the orchard. It also appears that, unless the cedar balls be removed in the early spring of each year from the infected [fol. 181] cedar trees, there is no remedy for the cedar rust disease except the destruction of the *in* infected cedar trees. If the infected cedar tree infects an orchard, this orchard will infect previously uninfected cedar trees, and thus this dangerous disease is widely disseminated."

See also Bowman v. State Entomologist, 128 Va. 351, 369-70.

This assignment of error is not well taken.

Assignments of error 7 and 8 may be considered together. They are as follows:

"7. In rejecting the evidence tendered by petitioners tending to prove that by reason of the destruction of said cedar trees (if the same be destroyed), petitioners will sustain damage to the extent of from five to seven thousand dollars because of the consequent diminution of the market value of petitioners' land;

"8. In holding that the statute does not require that compensation shall be made to petitioners for any diminution in the market value of their land resulting from such destruction of the cedar trees thereon; or, if the statute does not provide for such compensation, in holding that the same is not void as in contravention of said first clause [fol. 182] of the Fourteenth Amendment of the Constitution of the United States."

So far as the eighth assignment deals with the constitutional questions therein mentioned, it is controlled by the Bowman case. One of the plaintiffs testified that he considered the trees bordering the drive to his house as ornamental, and that they had a "special value from a

scenic standpoint;" and it was this value they were seeking to prove in asking the witnesses the value of the farm, with and without the cedars.

The statute, so far as it relates to damages, is not clear, and we are to gather the intention of the legislature as best we can from a consideration of it as a whole. Section 885 of the Code denounces the prohibitory cedars within the territory designated as "a public nuisance". It is made unlawful to even own them, and the owner is required to destroy them. If he does so, no provision is made for compensation. Sec. 886 contains a similar provision requiring the owner to destroy the trees on notice from the State Entomologist, and no provision is made for the ascertainment or payment of the resulting damage, if any. Sec. 887 provides for the treatment of diseased cedars under the direction of the State Entomologist, and the failure to obey his direction is made a misdemeanor, [fol. 183] but still nothing is said about compensation for the expense entailed. Section 889 directs the trees to be cut down by the State Entomologist, if the owner fails to do so, and provision is made for the payment of the "expense thereof", but no provision is made for the payment to the owner of any compensation. It is only when provision is made for an appeal[1] to the circuit court that anything is said about damages, and even then the language of the statute seems to intimate that it is doubtful if any damage will be incurred. It is not usual to pay the owner or occupant of land to abate a nuisance on his land, although

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[fol. 184] [1] "Sec. 891. Appeal from Order of State Entomologist; Damages Paid by County Treasurer.—Any owner finding objection to the order of the State Entomologist in requiring him to destroy his cedar tree or trees may appeal from said order to the circuit court of the county in which said trees are located, but said appeal must be taken within fifteen days from the date upon which the notice to destroy the same is served upon him. Notice in writing of said appeal must be filed with the clerk of said court who shall forthwith transmit a copy thereof to the State Entomologist. The filing of said notice shall act as a stay of the proceedings of the State Entomologist until it is heard and decided. The court in regular or special session shall thereupon hear the objections, and is hereby authorized to pass upon all questions involved, and determine the amount of damages, if any, which will be incurred by the owner in case said trees are destroyed, and the costs incurred or to be incurred in cutting down trees under section eight hundred and eighty-six. If the court should find any damage or such expense sustained, he shall order the amount so ascertained to be paid to the owner by the treasurer of the county out of the general fund of said county, and such order shall be entered by the clerk in the law order book of the said court."

within legislative power, and it must be presumed that the legislature knew the insignificant value of such cedars as are indigenous to the soil of the Valley. It realized, however, that some damage might be sustained or incurred by the owner by interruption of his farming operations by dragging or hauling the cedars over the sod, or land in cultivation, by the burning of the brush, by the trimming of the cedars for posts or firewood, by his personal supervision of the work in order to protect his farms from undue injury, or in selecting trees to be trimmed and cut the proper length for posts or firewood, and some expense would be incurred if he did the cutting himself, or had it [fol. 185] done. No doubt the legislature deemed such outlays as proper damages and expenses to be paid to the owner, if the circuit court deemed them proper. The State was not taking or damaging the property of the owner for either a public or a private use. It was simply abating a nuisance, and requiring the owner to so use his property as not to injure another. While under no obligation to do so, the legislature seems to have been willing to pay such incidental damages and expenses as we have indicated, to make the owner whole in this respect, and the statute so provided. But we find no indication in the statute of an intent to pay for scenic value. Section 887 makes provision for the preservation of cedar trees that are "ornamental trees in dooryards, grave yards, cemeteries and parks," if practical. These would be few and by careful attention might be treated and preserved in deference to sentiment, but it made no provision for the payment for scenic value of a double row of two hundred infected trees bordering a driveway from the owner's house to the highway, nor for the "several thousand" small cedars scattered over the farm. The views of the trial court as to the damages to be allowed the owner are thus expressed in the final order made in this case:

[fol. 186] "The court in determining the amount of damages which will be incurred by the defendants in case the cedar trees are destroyed, did not determine the amount according to the doctrines applicable to the taking of land under the statute of eminent domain, but followed the rules of decision beginning with the judgment of the late Judge Turner in the case of Virginia State Entomologist v. Glass,

decided in the Circuit Court of the county of Frederick in the year —— and of a very large number of cases decided by this court, including the case of Virginia State Entomologist v. Bowman, from which an appeal was taken to the Supreme Court of Appeals of Virginia, and Virginia State Entomologist v. Funkhouser, and same against Fitzmoyer, from which last two decisions an appeal was ineffectually sought. This court, in construing the act, and especially sections 885, 886, 887 and 891, is of the opinion that the damages in contemplation of the act are such damages to the land only as would be incurred by the defendants incident to and resultant from the cutting of the cedars, including reasonable compensation to the cedar tree owner for supervision while the work of cutting and destroying the cedars was being done, and that it was not in contemplation of the act that the cedar tree owner, in case his cedars [fol. 187] were a public nuisance, should be compensated in face of his refusal to obey the order of the Entomologist, on the basis of recovery for taking or damaging property under the statutes of eminent domain.

"But the court is of the opinion that the legislature only contemplated by this act that the county and ultimately the orchardists should pay the costs of destroying the trees, and the actual damage done the premises from which the cedars are removed by the work necessary to be done to destroy the trees and clear off the land, the owner to get the trees and wood for his own use, this damage to include compensation for injuring the sod and for interrupting and interferring with the use and enjoyment of the land, and any resultant injury due to the acts of cutting and destruction of the said cedar trees."

In the case of land taken or damaged for a public use, the legislature has been very careful to provide the most ample protection for the land owner at every stage of the proceeding, and to declare in detail what these proceedings shall be, Code sh. 176. But there is nothing of that kind in the statute under consideration, and no indication that similar damages should be allowed. It it had been intended that similar damages should be allowed, it would [fols. 188 & 189] seem that the legislature would have required a proceeding under chapter 176, where all the machinery was provided, and the details of the procedure pre-

scribed. We approve the holding of the trial court on the subject of damages to be allowed to the owners of the cedar trees.

We find no error in the judgment of the trial court, and and its is accordingly affirmed. Affirmed.

IN SUPREME COURT OF APPEALS OF VIRGINIA

DISSENTING OPINION

CAMPBELL, J., dissenting:

I am unable to concur in the conclusion reached as to the damages awarded.

A Copy. Teste: H. Steward Jones, C. C.
A Copy. Teste: H. H. Wayt, Clerk.

[fol. 190] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

Upon a Writ of Error and Supersedeas to an Order Entered by the Circuit Court of Shenandoah County on the 22nd day of January, 1926

JUDGMENT—November 18, 1926

This cause, which is pending in this Court at its place of session at Staunton, having been fully heard but not determined at said place of session; this day came here the parties by counsel, and the Court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order appealed from. It is therefore considered that the same be affirmed, and that the plaintiffs in error pay to the defendant in error damages according to law, and also his costs by him expended about his defence herein.

Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this cause, to the Clerk of this Court at Staunton, who will enter this order in the order book there and certify it to the said circuit court.

A Copy. Teste: H. Stewart Jones, C. C.
A Copy. Teste: H. H. Wayt, Clerk.

Defendant in error's costs at Richmond: $1.77.

[fol. 191] Petition for rehearing, covering 27 pages, filed January 5, 1927, omitted from this print. It was denied and nothing more by order January 24, 1927.

[fol. 192] Submission of petition for rehearing January 11, 1927, omitted in printing.

[fol. 193] In Supreme Court of Appeals of Virginia

[Title omitted]

Order Denying Rehearing—January 24, 1927

On mature consideration of the petition of the plaintiffs in error to set aside the judgment entered herein on the 18th day of November, 1926, and grant a rehearing thereof, the prayer of said petition is denied.

A Copy. Teste. H. Stewart Jones, C. C.
A Copy. Teste: H. H. Wayt, Clerk.

[fols. 194 & 195] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 196] President's certificate to clerk, paper omitted in printing.

Clerk's certificate to president omitted in printing.

[fol. 197] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFFS IN ERROR TO PRINT THE ENTIRE RECORD—Filed March 21, 1927

Now come the plaintiffs in error, and in pursuance of Rule 11, subdivision 9, of the United States Supreme Court, state that the points on which they intend to rely are, in identical words, the assignment of errors contained in the record, to-wit:

The court erred in holding that the Act of the Legislature of Virginia know as the Cedar Rust Law, approved March 4th, 1914 (Acts of 1914, page 49), and incorporated in the Code of Virginia, 1919, Sections 885 to 893 inclusive, as amended March 16th, 1920 (Acts of 1920, page 349), under and in pursuance of which the defendant in error claimed the authority to order the destruction of the red cedar trees in his said notice mentioned, was not repugnant to Section 1 of the Fourteenth Amendment of the Federal Constitution, and void,

First. In that it deprived your petitioners of their property without due process of law:

Second. In that it denied to your petitioners the equal protection of the law;

Third. In that said statute is an unwarranted and arbitrary interference with the rights of your petitioners to [fol. 198] use and enjoy their property;

Fourth. In that it amounts to the taking of the property of your petitioners for the benefit of private owners of apple orchards;

Fifth. In that said statute, by its own terms, is inoperative as to any particular territory or locality unless and until ten or more freeholders have requested the Entomologist to examine the cedars of such locality to ascertain whether any of them, within two miles of an apple orchard, are infected with cedar rust, and upon discovery of such infection to destroy them; and

Sixth. In that said statute, upon its face, is too uncertain and indefinite to permit of its enforcement, neither the term "locality" nor the term "orchard" therein employed being thereby defined, and the same not being terms of definite or ascertainable meaning as commonly employed, nor having any technical or legal meaning.

That it will be necessary for the consideration of these points to incorporate in the transcript in this appeal the following:

The entire record as certified by the Clerk of the Supreme Court of Appeals of Virginia.

Randolph Hanison, Attorney for Plaintiffs in Error.

Dated this 9th day of February, 1927.

Due service acknowledged.

Jno. R. Saunders, Attorney for Defendant in Error.

[fol. 199] [File endorsement omitted.]

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NOTE

Since this brief was filed the case of *Daniel Kelleher* v. *French, Virginia State Entomologist,* on appeal from the District Court of the United States for the Western District of Virginia (22 Fed. 2d. 341), No. 687, involving, among others, the same questions, has been docketed and will probably be called for argument at the next term of Court, unless advanced for an earlier date.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

JULIA V. MILLER, &c., *Plaintiffs-in-Error,* vs. **W. J. SCHOENE,** **State Entomologist of Virginia,** *Defendant-in-Error.*	No. 199

BRIEF FOR PLAINTIFFS-IN-ERROR.

The judgment and order here complained of was rendered by the Supreme Court of Appeals of Virginia, on the 18th day of November, 1926. A re-hearing was denied January 24, 1927. (R. 174-175.) The opinion is reported in 146 Va. 175, and will be found at page 159 of the record.

Statement of Judgment to be Reviewed.

The case arose under what is known as the "Cedar Rust Law" of Virginia (Code of Virginia 1919, Sections 885-893), amended by Act of Assembly of 1920 (Virginia Acts 1920, p. 370), both the original law and said amendment being set forth in the appendix hereto. The proceeding was begun by a notice from the State Entomologist to one of the plaintiffs-in-error (the others having afterwards become parties to the preceding), reciting that certain red cedar trees, growing upon a tract of 225 acres of land, belonging to said plaintiffs-in-error, and located in Shenandoah County, Virginia, had been found to be infected by cedar rust of the apple, and constituted a menace to orchards within two miles of said cedar trees, and requiring said owners to cut down and destroy all of the red cedar trees growing upon said tract. From this notice plaintiffs-in-error appealed, as provided by said

statute, to the Circuit Court of Shenandoah County, and a judgment and order having been entered by said Court requiring the destruction of said cedar trees, a writ of error to said judgment and order was obtained from said Supreme Court of Appeals of Virginia, which, upon a hearing thereof, entered the judgment and order here complained of, likewise requiring that all of said cedar trees be cut down and destroyed.

Specific Claims Asserted.

On behalf of the plaintiffs-in-error, it was set up in said Supreme Court of Appeals, amongst other things (R. 40, 154-156).

1. That the provisions of said statute are invalid, because in conflict with the first clause of the Fourteenth Amendment of the Constitution of the United States, in that by an enforcement of said statute, plaintiffs'-in-error property will be taken without due process of law;

2. That said statute is invalid, as opposed to said clause of said amendment, because its enforcement will deny to plaintiffs-in-error the equal protection of the laws; and will contravene the principle inhering in government, forbidding the taking or destruction of private property, not for a public use, but for the promotion of the welfare of individuals;

3. That said statute is invalid for vagueness and indefiniteness;

4. That said statute is void because in conflict with said clause of said Fourteenth Amendment, in that by one of its provisions it is to become operative as to any particular locality by virtue of the action of ten or more freeholders;

5. That said statute, upon its face, is too uncertain to permit of its enforcement, neither the term "locality" nor the term "orchard" therein employed being thereby defined, and the same not being terms of definite or ascertainable meaning as commonly employed, nor having any technical or legal meaning.

Each of these contentions was overruled by said Supreme Court of Appeals and is relied upon here as the basis of this Court's jurisdiction.

This Court Has Jurisdiction.

The jurisdiction of this Court is invoked under the provision of Section 344, Title 28, U. S. C. (Jud. Code Section 237, Par. a.) that "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

Assignment of Errors.

The errors assigned which it is intended to urge in this Court are the several failures of said Supreme Court of Appeals to sustain the contentions above set forth, and are as follows:

The Court erred in holding that the Act of the Legislature of Virginia known as the Cedar Rust Law, approved March 4th, 1914 (Acts of 1914, page 49), and incorporated in the Code of Virginia, 1919, Sections 885 to 893 inclusive, as amended March 16th, 1920 (Acts of 1920, page 349), under and in pursuance of which the defendant in error claimed the authority to order the destruction of the red cedar trees in his said notice mentioned, was not repugnant to Section I of the Fourteenth Amendment of the Federal Constitution and void,

First. In that it deprived your petitioners of their property without due process of law;

Second. In that it denied to your petitioners the equal protection of the law;

[fol. 151] Third. In that said statute is an unwarranted and arbitrary interference with the rights of your petitioners to use and enjoy their property;

Fourth. In that it amounts to the taking of the property of your petitioners for the benefit of private owners of apple orchards;

Fifth. In that said statute, by its own terms, is inoperative as to any particular territory or locality unless and until ten or more freeholders have requested the Entomologist to examine the cedars of such locality and ascertain whether any of them, within two miles of an apple orchard, are infected with cedar rust, and upon discovery of such infection to destroy them; and

Sixth. In that said statute, upon its face, is too uncertain and indefinite to permit of its enforcement, neither the term "locality" nor the term "orchard" therein employed being thereby defined, and the same not being terms of definite or ascertainable meaning as commonly employed, nor having any technical or legal meaning. (R. 154-156.)

STATEMENT OF FACTS.

Upon the trial of the case it was proven that upon said 225-acre tract of land there are two rows of red cedar trees comprising about two hundred in number, along each side of a roadway, leading from a public highway to the dwelling house on said tract, which trees are old and very ornamental and add greatly to the scenic value of the premises. (R. 54, 121, 148.) On another portion of the tract is located a large group of cedars, and a very large number of sprouts are scattered over the tract. (R. 54.) Of these cedar trees, about one-third were found on examination by the Entomologist to bear cedar balls—thus indicating infection by cedar rust. (R. 60.) It was further shown that several apple orchards lie within one mile of the cedar trees on said tract, and that the danger of the spread of the disease from cedar tree to apple tree exists where they stand within two or two and one-half miles of each other. (R. 50 and 119.) Cedar rust is a disease which originates on either the cedar tree or the apple tree, indifferently, and is transmitted in alternate years from one to the other. (R. 62.) By it, the cedar trees are not injured, but size and quality of the apples are deteriorated by its presence on the apple trees. (R. 48-9.) Evidence was offered by the plaintiffs-in-error tending to show that in the event of the destruction of the cedars on said tract, its market value would be diminished by from five to seven thousand dollars, which evidence was rejected by the court, as not furnishing the true means by which to measure the damages allowable under the statute. (R. 150, 151, Cert. of Exceptions, 2, 3, and 4.)

It was further shown that in the Valley of Virginia, of which Shenandoah County is part, the investments in apple orchards are quite large. The value of the cedar trees at large in the same territory does not appear.

It was further shown that the cedar rust statute was adopted for Lee Magisterial District of Shenandoah County (the District within which said tract lies) by the County Board of Supervisors, June 14, 1920, which adoption was ratified by the Circuit Court of said County, September 13, 1920.

ARGUMENT.

By said Section 885 of the Code—the first section of the "Cedar Rust" statute—it is declared:

"It shall be unlawful for any person to keep alive and standing upon his * * * premises, any red cedar tree or trees which are or may be the source, harbor or host plant for * * * cedar rust of the apple, and any such cedar trees, when growing within a radius of one" (by the amendment of 1920 changed to two) "miles of any apple orchard * * * are declared a public nuisance, and shall be destroyed as hereinafter provided."

By Sect. 886 it is provided:

"In any County where the above mentioned disease exists, it shall be the duty of the State Entomologist * * * upon the request in writing, of ten or more reputable freeholders of any county or magisterial district, to make a preliminary investigation of the locality from which said request is received. * * * If upon such preliminary investigation of the localities from which said request is received, it shall appear that there are red cedar trees which constitute the source, harbor or host plant of said disease, and that said cedar tree or trees exist within two miles of any apple orchard or orchards in said locality, and constitute a menace to the health of said apple orchard or orchards, the State Entomologist * * * shall give notice in writing to the owner or owners of said cedar tree or trees to destroy the same, * * * and the owner or owners shall, within such time as may be prescribed in such notice * * * cut down and destroy said cedar trees."

By Section 889, it is provided that if the owner of the cedar trees shall fail, as required, to cut down such trees, it shall be the duty of the Entomologist himself to cause them to be cut down and destroyed.

Section 891 provides for an appeal by the cedar tree owner to the Circuit Court of the County from the order of the Entomologist, upon which appeal the Court shall "pass upon all questions involved and determine the amount of damages if any, which will be incurred by the owner in case such trees are destroyed," &c.

By Section 893, it is provided that "the eight preceding sections" (all those dealing with cedar trees) "shall not be in force in any county or magisterial district of any county, until the Board of Supervisors of that County shall by a recorded vote accept and adopt the same for the county or magisterial district in their county, and until such acceptance and adoption shall have been ratified and approved by the Circuit Court of such county."

I.

The Statute Is Invalid in that it Provides for the Taking of Private Property, Not for Public Use, but for the Benefit of other Private Persons.

In defining the rights of property, this Court has said:

"Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The constitution protects these essential attributes of property. Property consists of the free use, enjoyment and disposal of a person's acquisition without control or diminution *save by the law of the land.*"

Buchannan v. *Worley*, 245 U. S. 74.

The enforcement of this law against plaintiffs-in-error, involving the destruction of all the red cedar trees on their land, would result in the taking of property values of considerable magnitude, —not less than five to seven thousand dollars as they offered to prove.

It appears from the statute itself that the public has no interest whatsoever in its enforcement. The Entomologist and the Court are alike powerless to enforce it without the indispensable "request" of ten freeholders so to do. The only controversy that can arise is between the owners of apple trees and the owners of red cedar trees, in which the public has no possible interest. The Virginia Court of Appeals has itself said, in its opinion in the case (146 Va. at p. 155), *"No rights of any one except the owners of the orchands and the cedar trees are involved,* and those are measured by the statute."

The question is, therefore, presented by this record, whether one species of valuable property can be constitutionally declared a nuisance and destroyed, in order to increase the value of another species of privately owned property, or to promote the financial interests of the owners of the latter class of property.

We submit that the case at bar is in no wise controlled by the decisions cited by the Virginia Court in *Bowman* v. *Entomologist*, 128 Va. 351, in which statutes have been held valid which provided for the destruction, as nuisances, of noxious weeds (never of any value for any purpose) likely to become detrimental to agriculture; or of fruit trees infected with San Jose scale; or of peach trees affected by the "yellows," or of apple trees infected with fruit scab, or of oranges affected by "citrus canker,"—in all of which instances the disease was one so affecting the trees to be destroyed as that their value as property was utterly annihilated, and whose destruction, therefore, in order to preserve healthy trees, could in no proper sense be regarded as a taking of property. Such trees, so diseased, become of course, from the standpoint of value, of the same class as noxious weeds, and within the *de minimis* doctrine.

But in the case at bar, the cedar trees are not themselves injured in the slightest degree as a result of their becoming hosts of the cedar rust. Nor is their contribution to the market value of the land on which they grow at all diminished thereby. They are valuable property before the cedar rust becomes their guest—they remain just as valuable afterward.

It seems a wholly untenable view that of two species of valuable property, one may be selected for destruction in order to the protection of the other from the effects of a disease for whose existence and continuance they are interchangeably responsible.

II.

The Act Cannot be Sustained as a Legitimate Exercise of the Police Power.

It is sought to sustain the statute in question as a valid exercise of the police power. The argument to support this contention

proceeds upon the theory that legislation declared to be in the exercise of the police power is immune from the restraints of the constitution. If this proposition be sound, then the power of the courts to enforce many sacred constitutional safeguards for the protection of liberty and property, when illegally assaulted under the forms of law, would be entirely defeated. In no case can property be taken for private use, and the taking of private property for *public* use without due process of law and proper compensation can not be justified under the guise of the exercise of the police power.

In *Lochner* v. *New York*, 198 U. S. 45, Mr. Justice Peckham, speaking for the Court said:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power of the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people. Such legislation would be valid no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another delusive name for the supreme sovereignty of the state, to be exercised free from constitutional restraints."

Mr. Justice Day, speaking for the Court in *Dobbins* v. *Los Angeles*, 195 U. S. 233, said:

"It is now thoroughly well settled by the decisions of this Court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts or to use and enjoy property."

In the same case the Court said that the legislature "is not the exclusive judge as to what is a reasonable and just restraint upon

the constitutional right of the citizen," but that it is "always a judicial question whether any particular regulation of such right is a valid exercise of the police power."

Through the foregoing authorities runs the doctrine that the test of an act asserted to have been passed by virtue of the police power of the state is whether it is reasonable or whether it is merely an arbitrary deprivation of a right secured by the constitution.

In *Mehlos* v. *Milwaukee* (*Wis.*), 146 N. W. 884, the Court said:

"Too much significance can not be given to the word 'reasonable' in considering the scope of the police power in a constitutional sense. It took much time, notwithstanding clear declarations over and over again on the subject here and by the Federal Supreme Court and other courts, * * * for courts and text writers in general to appreciate that the final evidentiary test of the legitimacy of a police regulation is whether it is reasonable under all the circumstances."

In the case of *Penna. Coal Co.* v. *Mahon*, 260 U. S. 393, decided December 11, 1922, the validity of a statute of the State of Pennsylvania was involved which prohibited the mining of coal so as to cause the caving in, collapse or subsidence of public buildings, streets, roads, dwellings and other structures. It was sought to uphold the statute on the ground that it was a valid exercise of the police power designed to promote the safety of the citizens of the State, and the Court of Appeals of the State of Pennsylvania sustained the statute as a legitimate exercise of the police power. The Supreme Court of the United States reversed the State Court and held that as applied to lands under the city of Scranton which had been conveyed to surface owners with reservation of the right to mine and remove the underlying coal, the law was unconstitutional and void and not a valid exercise of police power, despite the finding by the State Legislature that its passage was necessary to protect the lives and safety of the citizens of the State.

In summing up the Court's conclusion, Mr. Justice Holmes, says:

"The protection of private property under the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decision under the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that can not be accomplished in this way under the Constitution of the United States. The general rule is at least that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * *In general, it is not plain that a man's misfortunes or necessities will justify his shifting the damage to his neighbor's shoulders.* We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

In the recent case of *Pierce, Governor, etc. of the State of Oregon & Others* v. *The Society of the Sisters, etc., & Others,* known as the Oregon School Law case, decided June 1, 1925, and reported in 296 Fed. 928, the Special Court of three Judges who heard the case below, speaking through Judge Wolverton who delivered the opinion, said:

"But there is a limit to the manner in which these powers may be exercised by the state. They can not be exercised arbitrarily and despotically nor unless there exists a reasonable relation between the character of the legislation and the policy to be subserved. Nor is the state legislature the final judge of the limitations of the police power. Its enactments will be set aside when found to be an unwarranted and arbitrary interference with the rights protected by the constitution in carrying on a lawful business or occupation or in the use or enjoyment of property. In other words, the exercise of the police power is subject to judicial review, and property rights can not be ruthlessly destroyed by

wrongful enactment." Citing *Lawton* v. *Steel,* 152 U. S. 133; *Dobbins* v. *Los Angeles,* 195 U. S. 223, and *Silz* v. *Hesterberg,* 211 U. S. 31.

And this Court in affirming this decision, speaking through Mr. Justice McReynolds, said:

"As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State." 268 U. S. 510.

It is plain, therefore, that a constitutional guarantee has prevailing force against the exercise of the police power when the action of the legislature is unreasonable and arbitrary, or when it goes to the extent of depriving one of valuable property not taken for a public use.

Neither the public health, the public safety nor the public morals or general welfare will be benefited or promoted in any degree by the statute in question, the declared purpose of which is to protect orchardists whose apple trees are within the prescribed distance from red cedar trees, or may be hereafter set out arbitrarily within the prescribed distance. But the alleged injury to the apple orchardist "will not justify his shifting the damage to his neighbor's shoulders." *Penn. Coal Co.* v. *Mahon, supra.*

We submit that there is not, in the American theory of government, any room for the view that one man's property may be taken or destroyed, either directly by eminent domain or indirectly, under the guise of taxation, or of the police power, in order to enhance the property values or the financial prosperity of another. Such a taking or destruction can only be accomplished by an unwarranted disregard of the Fourteenth Amendment, and in violation of the principle said by this Court to be inherent in the fabric of government, likewise forbidding it. Certain it is that the statute prescribes no means whereby the relative proportions or values of the growths of cedar trees to be destroyed in a particular case, and of the growths of the apple trees sought to be protected thereby, shall be measured. It is not even required that the Entomologist or the Court shall be of the opinion that the

orchards for whose benefit the destruction of the cedar owner's property is required, as compared with the cedars, are of any considerable value; that they shall be sufficient in extent or value to be deemed commercially important; or that, in any way, they shall be shown capable of any material contribution to the general prosperity of the state, or of the community in which they exist, even indirectly by adding to the values of its industries or contributing to its aggregate wealth.

It is only by a most strained and wholly unwarranted construction that it can be said that the statute is designed to or will promote the "general welfare" or the "general prosperity" by its enforcement in a case like that here presented. If it be assumed that the orchard industry of the section at large from which the case comes is one of considerable profit, that profit redounds to the benefit, not of the state or any of its political sub-divisions nor of any *public* activity, but *of the private owners of the orchards.* If it can be said that their prosperity is a part of the general prosperity, the same is true of every profit gaining enterprise in which citizens engage, and if the police power extends to the promotion, by means of the taking or destruction of privately owned valuable property, of the welfare or prosperity of the owners of orchards, it would seem clear that any of the other industrial or profit making enterprises of a portion of the people may be likewise so promoted. Upon such a view the property destroying capacity of the "police power" would be absolutely limitless, and the constitutional protection of property rights but hollow mockery.

The view here presented finds ample support in *Kaukauna &c. Co.* v. *Green Bay &c. Co.,* 142 U. S. at 273, 35 L. Ed. 1010, and in other decisions of this Court. In the Kaukauna case, it is said:

"It is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking one man's property for the benefit of another, which is not a constitutional exercise of the power of eminent domain."

Surely the "general welfare" or the "general prosperity," if those terms can be construed as meaning or including the financial well-being of the community resulting from the aggregation of the individual wealth of its citizens, is as truly promoted by the increase of manufactures as by the increase of orchards. It is also true that manufactures, of an infinite variety, are just as useful and even indispensable in the production of a food supply as is the production of apples. So that if the power exists to take or destroy private property for the one purpose, the same reason would justify it for the other, whether in the exercise of eminent domain or of the police power.

When the product of manufacturers is for home consumption, it may be much more truly said of it that it is promotive of the "general welfare" or the "general prosperity" of the people of Virginia, than of the products of orchards "practically all of which is marketed outside of the state, and at least fifty per cent. in foreign countries," as was testified by the Entomologist's witness, Mr. Massie. (R. 108-9.) So far as the police power of Virginia may be exercised for the promotion of a food supply, it must be confined to measures having an appreciable effect on the supply of food for the people of Virginia. With the food supply of the people of other states or of foreign countries the police power of Virginia has obviously no concern. The police power of the State is a power exercisable within and for the benefit of the State. It is a wholly unwarranted extension of that power to require, under its guise, the destruction of valuable property, located within the State, and entitled to the protection of the laws of the State and of the Federal Constitution, in order that the people of other states and countries may be provided for.

The Virginia court, in its statement of facts, says:

"These orchards, while especially valuable to the owners, furnish employment to a large number of laborers and others."

While not distinctly so stated, it would seem that this utterance of the court is intended as a basis for its refusal to hold that the statute is void as infringing the right of the cedar owner to hold and utilize his property as he may see fit, as against any supposed

necessity for its control or destruction, not for public benefit, and under a reasonable and valid exercise of the police power, but for the benefit of other owners of private property. With deference we submit that the statement furnishes no such basis. It may, in many instances, be of great importance, that one who owns or desires to establish a manufactory—employing thousands of laborers, and from whose operations multitudes of others may indirectly receive employment—which may even be so far reaching in its benefit that a whole city may grow up about it, practically all of whose citizens depend for their livelihood upon its continuance and prosperity—shall need to acquire or cause to be destroyed the property of another, in order to the promotion of his own prosperity, or the existence of his factory, and that of those directly and indirectly dependent thereon—nevertheless the Fourteenth Amendment stands as an insurmountable barrier against the desired appropriation of the property sought to be acquired or destroyed. And it is, as we conceive, the duty of the courts to prevent the subversion of the Amendment's protection of the sacred rights of property by an appeal to "police power," the results of whose invocation are to produce just the condition of insecurity and uncertainty which the Amendment was designed to prevent.

In *Ambler Realty Co.* v. *Village of Euclid*, 297 Fed. 307, decided January 14, 1924, it was sought to sustain a zoning ordinance as a valid exercise of the police power. In an able and exhaustive opinion, in which all the authorities were reviewed, it was held that property is protected from the "confiscatory exercise of police power," and the ordinance was declared invalid as depriving the owner of property without due process of law.

"If police power," said the Court, "meant what is claimed, all private property is now held subject to temporary and passing phases of public opinion, dominant for a day, in legislative and municipal assemblies."

III.

Control of Property of Plaintiffs-in-Error Is Exercised Under the Statute, by Other Owners of Property.

The statute declares in effect (Section 886) that if *"ten or more freeholders"* of *any* county or magisterial district "request" the *Entomologist* to do so, the latter shall investigate the *"locality* from which the request is received," and thereupon if the Entomologist finds that "there, in the *localities* from which the request is received," cedar trees which are the source, harbor or host plants of disease within the two-mile radius and which constitute a menace to *any* orchard, he shall give notice to the owner requiring him to destroy said trees, and after the time fixed by the notice shall himself destroy them, in case the owner has failed to do so.

Action by the Entomologist is *conditioned* upon the "request" of "ten or more freeholders," who need not be orchardists or have the slightest interest in orchards; he (Entomologist) has no power whatever, on his own initiative, either to require the destruction by the owner or himself to destroy the trees. No provision is made for the destruction in any other mode or as a result of any other procedure. The "request" of the freeholders is not only the indispensable basis of any action by the Entomologist, but is an absolute *sine qua non* of the Court's jurisdiction upon the appeal provided for by the statute. We use "jurisdiction" in the sense of "power to order the destruction."

It is manifest, therefore, that unless and until "ten or more freeholders complain" no step whatever can be taken by any person looking to the destruction of the cedars.

Moreover, if there be red cedar trees in a hundred different *localities,* in a county which has adopted the law, and "ten or more freeholders" in *one* of these localities "complain," the cedar trees, in the *locality* from which the complaint or request is received, are to be regarded as nuisances and destroyed, while in the ninety-nine remaining *localities* from which no "request" is received, the cedar trees must be permitted to stand, though they may be equally as obnoxious to the statute.

Thus in the last analysis the power of the Entomologist and of the Court to enforce the law against the cedar trees in any particular *locality* (in the county for which the act has been adopted) must depend upon the will of the "ten or more freeholders," which may be prompted by caprice, prejudice, malice or otherwise. If ten or more freeholders can be found to sign the request, the Entomologist is empowered to destroy the trees in the *locality from which the request comes;* but if that number of freeholders can not be found in *any locality* to so sign, the statute, though enacted by the legislature and adopted by the Supervisors, *must remain a dead letter.*

In brief, the statute has undertaken *not* to require the destruction of *all* cedar trees in the county or district in which the law is applicable and which are obnoxious to the law, but it has undertaken to *delegate to any ten or more freeholders who may choose to exercise it* the privilege of determining which if any, of the cedars, in any given *locality*, shall be destroyed, and which shall be permitted to remain standing. In other words, the statute not only confers upon ten individuals the arbitrary discretion of deciding upon the destruction of the property of their neighbors but of finding them guilty of a criminal offense.

The final result of the argument from which we can perceive no escape is that the statute, though enacted by the Legislature and adopted by the Board of Supervisors, is not by its own terms operative in any particular locality unless and until it has in addition been adopted for that *locality* by ten or more freeholders. They alone are empowered, in the exercise of their uncontrolled will, to make the law applicable in a particular locality and thus to destroy another's property.

It is clear, therefore, that, under this statute, the cedar owner's property rights, and even the question whether his conduct is criminal, are determined by irresponsible individuals who are not even invested with a semblance of official (much less legislative) authority.

A law which gives to an interested party the absolute right to make that law applicable to any given locality, and subject private property to destruction as a nuisance and declares an act to be a

public offense punishable by fine, is not government, but oppression in its worst form.

A statute identical with this in principle, which received the sanction of the Supreme Court of Appeals of Virginia, was condemned by this Court in the case of *Eubank* v. *Richmond*, 226 U. S. 137. That case involved the validity of an ordinance of the City of Richmond enacted under statutory authority, which provided that upon the request of the owners of two-thirds of a block the Street Committee of the City Council should establish a building line not less than five nor more than thirty feet from the street for that block. No discretion was by the ordinance or by the statute vested in the Street Committee, except to determine (*when requested by the owners of two-thirds of the block*) where within said five to thirty feet the building line should fall. The State Supreme Court, having upheld the ordinance, its decision was reversed by this Court on the ground that the ordinance was obnoxious to the Fourteenth Amendment, in that it was not to become operative as to any block unless and until the *owners of two-thirds of the particular block so requested.* This, said the Court, left to such owners and not to any legislative or other properly constituted body or board, power to control another in the use and enjoyment of his property.

This Court, after stating that the Virginia Court of Appeals had said that the Court was justified in concluding that it (the building line ordinance) "was passed in good faith and in the interest of the health, safety and comfort or convenience of the public and for the benefit of the property owners generally who are affected by its provisions, and that the enactment tends to accomplish all or at least some of these objects," proceeds to say:

"But necessarily it (the police power) has its limits and it must stop when it encounters the prohibition of the constitution. * * *

It (the ordinance) leaves no discretion in the Committee on Streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the

restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use but the kind of use which another set of owners may make of their property. * * * The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. * * * There is control of the property of plaintiff-in-error by other owners of property exercised under the ordinance. This, as we have said, is the vice of the ordinance and makes it as we think an unreasonable exercise of the police power."

So here the "action" of the Entomologist and the Court "is determined" in each case by a few irresponsible individuals. "In other words," to use the language of the Court, "part of the property owners determine the extent to which the other owners shall use and enjoy their property, and against the restriction they are impotent. This we emphasize."

The parallel between the case at bar and the Eubank case is complete and the decision in the Eubank case, we submit, controls the case at bar.

See also:

Fortune v. *Braswell* (*Ga.*), 77 S. E. 819;
Cleveland Ry. Co. v. *People* (*Ill.*), 72 N. E. 725;
Noel v. *People* (*Ill.*), 58 N. E. 616;
Railway Co. v. *Todd* (*Ky.*), 5 S. W. 56, 11 L. R. A. 985;
Morton v. *Holes* (*N. D.*), 115 N. W. 256.

In passing upon the contention now under discussion, the Virginia Court of Appeals, in its opinion, refers to *Kelleher* v. *Schoene,* 14 Fed. (2nd) 341, and quotes from the opinion in that case the language:

"So long as a request it not signed by ten freeholders, the owner of the cedar trees remains undisturbed."

This statement is quite obviously true. Equally obviously, it is also true that because the cedar owner in any particular locality

can not, under the statute, be disturbed, the law *quoad*, such locality, is wholly inoperative until such request is made. So that, although adopted for the county or district embracing the locality, it depends upon the will of the ten or more freeholders whether or not the cedars in that locality are to be regarded and treated as subject to the law providing for their destruction. Otherwise, it could not be true, as the same opinion further says, that *"the provision in question tends to protect the owners of cedar trees from possible official overzealousness."* Why does it so protect them? Because, no one, official or private citizen, can possibly act against the trees of the locality until requested by the freeholders so to do.

The further remark of the Court in the Kelleher case, embraced in the quotation by the Virginia Court, in its opinion, that "the freeholders are not given any power themselves to order the destruction of cedar trees, nor can they control the Entomologist in the performance of his duties, or the Circuit Court of the County in the exercise of its functions," seems a veritable juggling with words. It is true, that under the statute, the freeholders are not empowered to give the final order for the destruction of the trees. *But they and they alone can by what is inaptly termed their "request," bring about the destruction.* Since upon the receipt of the "request" the Entomologist is under the *absolute duty* of making the examination, and upon discovery of the infection, of ordering the destruction, it is clear that the destruction results from and can result *only* from, the "request," which is, in point of fact, a command. No discretion whatever is vested in the Entomologist. *He must,* when requested, make the inspection. *He must,* when the infection is found, *order the destruction.*

Under the ordinance involved in the Eubank case, the property owners were not themselves empowered to establish a building line. They had not a particle more control over the Street Committee relative to the establishment of the line than have the freeholders here over the actions of the Entomologist. Under the ordinance, the request imposed the duty of establishing the line — under the statute here, the request imposes the duty of destroying the infected trees. Under the ordinance the power of the

committee to establish a building line could not arise until the request was made—under the statute the power of the Entomologist to destroy the trees does not arise until the request is made. An enforcement of the ordinance gave, as this Court held, to some of the property holders control over the use to be made of the property of another—for the same reason the statute gives the same power, by the same method, to ten property holders to control the use of the property of another; nay, even to control the question of its continued existence or destruction. The cedar trees, under the statute, occupy a position identical with that of the defeated gladiator of Rome,—thumbs up, life; thumbs down, death!

In the same quotation from the Kelleher case, it is said that if the provision for the request of the freeholders "had been omitted, the remainder of the statute being as it is, infected cedar trees, within two miles of an orchard, in a district, which has duly adopted the law, would be quite as liable to destruction as they are now." *But the requirement of the request is there*—it is an integral and inseparable part of the statute. *Because it is there*, and because the applicability of the statute to any particular locality, is made to depend upon the request, the doctrine of the Eubank case applies here with full force, and the statute is rendered invalid, even if otherwise constitutional.

The Virginia Court of Appeals for itself proceeds to say:

"The request of the freeholders simply inaugurates a preliminary investigation, which, at the instance of the owner of the cedar trees, will result in a judicial trial, wherein both sides are allowed to introduce all legal evidence, and 'the court is authorized to pass upon all questions involved'."

If the decision of the Virginia Court be permitted to stand, it would seem that the only questions involved upon such trial as to which "legal evidence" may be introduced, are (1) are there, on the land of the appealing owner, cedar trees infected by cedar rust; and (2) do they stand within two miles of an orchard. If the evidence answers these questions affirmatively, *the court* (as is the Entomologist in the first instance), *is absolutely bound be-*

cause of the freeholders' request to order the destruction of the trees, if the same can not be in the *opinion* of the Entomologist, treated so as to render them innocuous.

In a case arising under the ordinance involved in the Eubank case, it would of course, have been always open to the Court, upon application of the owner to be affected by its enforcement to inquire (1) whether the signers of the request to the Street Committee were owners of real estate in the block involved, and (2) whether the land held by them constituted two-thirds of the block to be affected. So that it appears clear that the right to appeal to the court for the settlement of a dispute as to the facts necessary to bring the case within the purview of the law, has nothing whatever to do with the validity of the law itself, under which the proceeding is had. The denial of due process, of which petitioners complain, consists not in any refusal to hear them as to the facts upon which under the terms of the statute, its enforcement depends, but in the destruction of their property by virtue of a statute which is invalid, whether such facts exist or not.

Whether the order of the Entomologist be or be not followed by an appeal to the Court, it remains true, in either case, that the destruction of the valuable property of plaintiffs-in-error, and those situated like them, *results from, and is wholly attributable to, the request of the freeholders.*

The Virginia Court says (p. 184):

"The procedure is similar to and may have been suggested by, the procedure under Sect. 1520 of the Code, where upon complaint of five or more citizens of a public nuisance, the court is required to summon a special grand jury to specially investigate such complaint. *Jeremy Imp. Co.* v. *Commonwealth,* 106 Va., 482, arose under this statute, and the Court assumed rather than decided the validity of the statute."

To us it seems that there is no real analogy between said Sect. 1520 and the Cedar Rust statute. Section 1520 is as follows:

"When complaint is made to the circuit court of any county, or the corporation court of any city of this State, by five or more

citizens of any county, city or town, setting forth the existence of a public or common nuisance, the court, or the judge thereof in vacation, shall summon a special grand jury, in the mode now provided by law, to the next term of such court, to especially investigate such complaint; and if upon a full investigation of such complaint the grand jury is satisfied that the nuisance complained of is of a public nature, it shall proceed to make presentment against such person or persons as they may find have created or caused such nuisance. If any such nuisance be upon premises the owner of which did not create or cause such nuisance, but permitted its continuation, such owner shall, for the purposes of this section, be deemed responsible for such nuisance, and if such owner be not a resident or citizen of this State, or one whose residence is not known, such presentment shall be against the premises upon which such nuisance is.

"Upon any such presentment the court shall order a copy thereof to be served upon the person or persons presented, or whose property is presented, in the manner prescribed by law as to the service of notices. To any such proceeding, if it be in rem, any person interested, or for and in behalf of the owner of such premises, may make defense.

"Upon the trial of any such presentment the person or persons who have created, caused, or permitted the continuation of such nuisance, if found guilty, shall be fined, in the discretion of the jury, not more than five thousand dollars; and upon such verdict the judgment of the court shall be for the amount of fine imposed and the costs of such proceeding, and also that such nuisance be forthwith removed and abated. Every judgment in rem under this statute shall be enforced in the same manner as an attachment levied on real estate."

It is to be borne in mind that the Virginia Court has itself declared in *Bowman* v. *Entomologist,* 128 Va. 351, at p. 361, that the red cedar trees denounced by the Cedar Rust statute are not nuisances at common law.

Said Section 1520 merely provides *one method of procedure* for the abatement of what is already *under the common law,* a nuis-

ance. It declares no new subject to be a nuisance, and contains nothing to indicate that the remedy it provides is exclusive. A common law nuisance is indictable at common law. Even a statutory nuisance to the declaration of which no remedy is annexed is so indictable. In the case of the Cedar Rust law, the remedy is annexed to the declaration and upon well established principles is exclusive. Section 1520 does not even provide a new remedy. What it does do is merely to require that upon the application of five freeholders, a special grand jury shall be called to consider the nuisance complained of,—a mere speeding up of the process by which the nuisance might be abated in the absence of that section. The effect of Section 1520 is, therefore, not to place the complaining freeholders in a position to have the already existing common law made applicable to any territory in which it would not otherwise apply, nor to bring about the abatement of a nuisance which, in the absence of such complaint, would not be abatable. Under Section 1520, the complaint of the freeholders, while not exactly so, is approximately analogous to a warrant, which may be sworn out by any one, charging that an offense under already existing law, already applicable to the place of the offense, has been committed. Under the Cedar Rust law, it is the complaint of the freeholders which not only inaugurates the proceeding but, in addition, renders the maintenance of the cedars in the area to which the complaint relates, which, prior thereto was absolutely innocent, an offense against the law—another way of saying that it is left to the option of the freeholders whether the statute shall apply in a particular area.

IV.

The Statute Is Void for Vagueness and Uncertainty.

The statute (Virginia Code, Sec. 886) provides that:

"In any county in this State where the above mentioned disease exists, it shall be the duty of the State Entomologist * * * upon the request in writing of ten or more freeholders of any county or magisterial district"—not of that in which the disease exists nor

of a county or district for which the statute has been adopted—"to make a preliminary examination of the locality from which said request is received," and destroy such infected cedar tree as such investigation may disclose, existing in such locality, and within a radius of two miles of an apple orchard, in such locality.

It will be noted that neither here nor elsewhere in the statute is there any definition of what is meant by the term "freeholders of any county or magisterial district." Does it intend persons who, being resident within any county or magisterial district, in the same locality in which the disease exists, own real estate in the same county or magisterial district? Or is it meant that such residents of any county and of such locality who own real estate anywhere—within or without the State—may become signatory to the request? May one who, not being a resident of the county or district where the disease exists, nor of that locality, nevertheless owns real estate there situate, be such signer? Does the statute permit such request to emanate from ten persons, all of whom reside without the state, but own real estate within the locality, referred to? Or is it permissible for ten persons residing within such locality and owning real estate not located in Virginia, to make such demand? To these questions, the statute makes no reply. It contains no criterion whatever by which to determine who are the freeholders of the locality to whom is confided the power of invoking the axe of the Entomologist.

V.

"Locality" as Used in the Statute.

Again, what is the "locality" intended by the statute? No technical meaning attaches to the term. That it is not synonymous with "County" or "Magisterial District" is at once apparent when it is considered that the several terms are employed in the very same section of the statute, and must, for that reason, under familiar rules of construction, be taken to intend different meanings. In common usage the word "locality" is extremely elastic in its meaning, and may refer to any of a vast variety of areas, from

the most restricted to a far-stretching territory. For instance, the "locality" of a spring of water in the mountains would usually intend but a small area surrounding the spring. If one in Staunton, Virginia, should speak of the "locality" of Richmond, one may desire to be understood as referring to the territory in the neighborhood of Richmond extending as far as Petersburg, while, if a speaker be in Europe he may, by the "locality" of Virginia mean that State and its neighboring states. So that when the statute provides that the freeholders are to be of the "locality" which they ask shall be investigated, and in which offending cedar trees are to be destroyed, the statute affords no criterion by which the Entomologist or the Court may determine whether the signers of the request are of the requisite locality.

Suppose that in a county for which the statute has not been adopted there exists an orchard; that in an adjoining county for which it has been adopted, and in the same "locality"—whatever that may mean—there are valuable cedar trees; is it open to ten freeholders of the non-adopting county to request—in effect, to require—the destruction of such cedar trees? Whether so or not, if, the orchard being situated as above supposed, is surrounded, on all sides, by an enormous growth of cedar trees, growing like itself in the non-adopting county, and some small part of the growth of cedar trees, extends over into the adopting county—can the cedar trees in the latter be destroyed on application of the freeholders of either county, while those in the non-adopting county must remain untouched?

Connally v. *Gen. Constr. Co.*, 269 U. S. 383, is conclusive of the soundness of our position relative to the vagueness of the term "locality." There a statute providing "that not less than the current rate of per diem wages in the *locality* where the work is performed, shall be paid to laborers, workmen, * * * in public institutions, or other persons so employed by or on behalf of the state * * *." The statute was held void, one of the reasons therefor being thus stated by the Court:

"In the second place, additional obscurity is imparted to the statute by the use of the qualifying word 'locality.' Who can say, with any degree of accuracy, what areas constitute the locality

where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. It is said that this question is settled for us by the decision of the state supreme court on rehearing in *State* v. *Tibbetts* — Okla. Crim. Rep.—205 Pac. 77, 779. But all the court did there was to define the word 'locality' as meaning place, near the place, vicinity, or neighborhood. Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties. The word neighborhood is quite as susceptible of variation as the word locality. Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles. See *Schmidt* v. *Kansas City Distilling Co.*, 90 Mo. 284, 296, 59 Am. Rep. 16, 1 S. W. 805, 2 S. W. 417; *Woods* v. *Cochrane*, 38 Iowa, 484, 485; *State exrel. Christie* v. *Meek*, 26 Wash. 405, 407, 408, 67 Pac. 76; *Millville Improv. Co.* v. *Pitman, G. & C. Gas Co.*, 75 N. J. L. 410, 312, 67 Atl. 1005; *Thomas* v. *Marshfield*, 10 Pick, 364, 367. The case last cited held that a grant of common to the inhabitants of a certain neighborhood was void because the term neighborhood was not sufficiently certain to identify the grantees. In other connections or under other conditions the term locality might be definite enough, but not so in a statute such as that under review imposing criminal penalties. Certainly, the expression near the place leaves much to be desired in the way of a delimitation of boundaries; for it at once provokes the inquiry, how near? And this element of uncertainty can not here be put aside as of no consequence, for, as the rate of wages may vary—as in the present case it is alleged it does vary—among different employers and according to the relative efficiency of the workmen, so it may vary in different sections. The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional

guaranty of due process can not be allowed to rest upon a support so equivocal."

The Virginia Court, in its opinion in the instant case, has placed two widely variant interpretations on the term "locality" as employed in the Cedar Rust statute; which interpretations are so opposed, each to the other, that it would seem that the matter is still open for determination by this Court, notwithstanding the rule that this Court is bound by the construction placed on a statute by the highest court of the state.

At the outset of the comment on this holding, it is very interesting to observe that the Virginia Court says: "The statute is to be read as a whole, and when so read *it is fairly plain that what to be investigated was the existence of infected cedar* trees within two miles of an apple orchard. * * * The location of the cedars and their distances from an apple orchard or orchards is the subject of investigation, *and this is the locality referred to in the statute.*" Whereby, as we apprehend, it is meant that the "locality" from which the request must come to the Entomologist is the area within a radius of two miles of an orchard—and that it is within this same "locality" that infected cedars must be found, in order to warrant their destruction.

This statement is almost immediately followed by another, quoted from the Kelleher case, supra, apparently with the approval of the Virginia Court, viz:

"While the expression (Sect. 886) 'the locality from which the request is received is not a happy one,' it means merely *the locality to which the request relates, and does not mean that the freeholders who sign must reside in, or must own estates lying in any particular locality.* * * * As there is no uncertainty of meaning as to who are the freeholders of Ashby District, and as the statute does not authorize a request which leaves uncertain the territory to be examined, we think it unnecessary to further discuss this objection to the statute."

By this last mentioned interpretation we apprehend that it is meant that it is sufficient within the intent of the statute that the freeholders be such within the county or district within which the Entomologist's investigation and consequent destruction are to

occur; and that they need not be freeholders within the radius of two miles of an orchard, as the first interpretation requires.

It is clear from the foregoing variant interpretations by the Court of Appeals of Virginia of the word "locality," that the Act leaves wholly uncertain the boundary of the area to be investigated. The "locality from which the request comes" is obviously so vague and indefinite that no two men could agree upon the area to be investigated. The term may be "equally satisfied by areas measured by rods or by miles."

We submit that, as was said by this Court in the Connelly case, "the constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal."

VI.

"Orchard" as Used in the Statute.

But if it be held that the term "locality" is sufficiently definite, what is to be said of the term "orchard," or "orchards." How many apple trees must be grouped together to constitute an "orchard"? Is it to be held that the owner of cedar trees, whose loss of them will inflict injury upon him to the extent of five to seven thousand dollars, as in this case, or of twenty-five or fifty thousand dollars, in cases which may readily occur, is to be obliged to submit to the loss in order to the preservation of a clump of apple trees, constituting what some persons might regard as a domestic orchard, but really adding no value to the land upon which it is located? Or must the orchard to be protected be of such value to the land on which it grows, as to be considered in comparison with the value of the cedars as growing trees? If the latter —and surely the latter must be the true view—how considerable? What relation must the "orchard's" value bear to that of the cedars? Or if the value of the orchard is alone to be considered, how valuable must it be? Must the orchard be of sufficient magnitude to be reasonably classed as a commercial orchard? If so, must it contain apples of a variety which are commercially important?

In order that the statute may be applied under the police power doctrine, the answers to the last two questions, must, it would seem, be in the affirmative, because otherwise the reason assigned by the court, that the statute is in aid of an important industry of the State, must fail. But the record here is wholly silent as to the comparative value of petitioners' cedars and of the orchards within two miles thereof. It is even silent as to the value or size of such orchards.

The point which it is now desired to urge, more particularly is, however, that there is lacking in the statute any criterion for the determination of what constitutes an "orchard" for whose protection the cedars may be destroyed,—another instance of vagueness and indefiniteness, because of which the statute is void, as a denial of due process.

VII.

Private Property Cannot be Taken Under the Guise of the Police Power for Public Use Without Compensation.

At the trial of this case, plaintiffs-in-error offered to prove that in the event of the destruction of the cedar trees on said tract of land, as required by the orders of the Entomologist and the court, the land would suffer a diminution in its market value of from five to seven thousand dollars, for which they must be compensated if the trees should be destroyed. This evidence was rejected, on the ground that the statute does not allow damages for such diminution, and the Court of Appeals sustained the ruling.

It is submitted that under this construction of the statute the same is plainly void, as contrary to the first clause of the Fourteenth Amendment, and that this construction is clearly sustained by the ruling of this Court in *Chicago &c. R. R. Co.* v. *Illinois*, 200 U. S., wherein, at pages 592-3, it is said:

"Private property can not be taken without compensation for public use under police regulation relating strictly to the public health, the public morals, or the public safety, any more than under a police regulation having no relation to such matters, but

only to the general welfare * * * The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the execution of governmental power. If, in the execution of any power, no matter what it is, the government, Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to its owner," citing cases.

The language of the first sentence of this excerpt is equivalent, of course, to a direct statement that property can not be taken (or destroyed) which is of appreciable value, without compensation, under a police regulation enacted to promote even the general welfare.

In conclusion we submit that the Act in question contravenes the guarantees contained in the Fourteenth Amendment of the Constitution, and is therefore void.

C. W. Bennick,
Randolph Harrison,
D. O. Dechert,
Counsel for Plaintiffs-in-Error.

APPENDIX.

CEDAR RUST STATUTE, CODE OF VIRGINIA, 1919.

SECTION 885. Red cedar trees; declared public nuisance, when.—It shall hereafter be unlawful within this State for any person, firm or corporation to own, plant or keep alive and standing upon his or its premises, any red cedar tree, or trees (which are or may be) the source, harbor or host plant for the communicable plant disease commonly known as "orange" or "cedar rust," of the apple, and any such cedar trees, when growing within a radius of one mile of any apple orchard in this State, are hereby declared a public nuisance and shall be destroyed as hereinafter provided, and it shall be the duty of the owners of any such cedar trees to destroy the same as soon as they are directed to do so by the State entomologist, as hereinafter provided.

SECTION 886. In any county in this State where the above-mentioned disease exists, or there is reason to believe it exists, it shall be the duty of the State Entomologist, in person or by an assistant, upon the request in writing of ten or more reputable freeholders of any county or magisterial district, to make a preliminary investigation of the locality from which said request is received, to ascertain if any cedar tree or trees in said locality are the source of or constitute the host plant for the said disease known as "orange" or "cedar rust" of the apple, and constitute a menace to the health of any apple orchard in said locality, and that said cedar tree or trees exist within a radius of two miles of an apple orchard in said locality. If upon such preliminary investigation of the localities from which said request is received it shall appear that there are cedar trees which constitute the source, harbor or host plant of said disease, and that said cedar tree or trees exist within a radius of two miles of any apple orchard or orchards in said locality and constitute a menace to the health to said apple orchard or orchards, the State Entomologist or his assistant, shall give notice in writing to the owner or owners of

said cedar tree or trees to destroy the same; such notice shall contain a brief statement of the fact found to exist whereby it is deemed necessary or proper to destroy said cedar trees and call attention to the law under which it is proposed to destroy said cedar trees, and the owner or owners shall within such time as may be prescribed in such notice by the State Entomologist cut down and destroy said cedar trees.

SECTION 887. If, however, in the judgment of the State Entomologist it is practical to treat any such cedar tree or trees, especially ornamental trees in dooryards, graveyards, cemeteries and parks, which have been declared as aforesaid to constitute a menace to any apple orchard in said locality, in such a way as to render it or them harmless, he may direct such treatment to be carried out by the owner under the direction of any agent he may appoint for that purpose. Said directions for treatment shall be put in writing by the State Entomologist and a copy placed in the hands of said owner. Any owner undertaking to so treat his trees and refusing or failing to carry out said written directions shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars nor more than fifty dollars.

SECTION 888. The notice required under sections eight hundred and eighty-six and eight hundred and eighty-nine may be served upon the owner of said trees if a resident in the State in the manner prescribed by section six thousand and forty-one, or if such owner be not a resident of this State, by serving a copy of such notice upon his tenant or other person having charge of the premises.

SECTION 889. Whenever the owner or owners of said cedar tree or trees refuse or neglect to cut down or destroy the same within the time specified in the notice given by the State Entomologist as prescribed by section eight hundred and eighty-six, it shall be the duty of the State Entomologist to cause said trees to be at once cut down or destroyed and the necessary expense thereof shall be paid by his warrant on the county treasurer to be paid out of the general funds of the county and to be reimbursed as provided in section eight hundred and ninety-two.

On petition of ten or more reputable freeholders in any county or magisterial district in which this law has been made operative as provided in section eight hundred and ninety-three, the State Entomologist may arrange for the removal of cedar sprouts on land from which the cedars have already been removed, the necessary expense thereof being paid by his warrant on the county treasurer as provided above without the formality of serving a legal notice on the owner of the land.

SECTION 890. The State Entomologist, his assistant or employees are empowered with authority to enter upon any public or private premises for the purpose of carrying out the provisions of this chapter. Any person or persons who shall obstruct or hinder the said Entomologist, his assistants or employees in the discharge of their duties under this chapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars nor more than fifty dollars.

SECTION 891. Any owner finding objection to the order of the State Entomologist in requiring him to destroy his cedar tree or trees may appeal from said order to the circuit court of the county in which said trees are located, but said appeal must be taken within fifteen days from the date upon which the notice to destroy the same is served upon him. Notice in writing of said appeal must be filed with the clerk of said court who shall forthwith transmit a copy thereof to the State Entomologist. The filing of said notice shall act as a stay of the proceedings of the State Entomologist until it is heard and decided. The court in regular or special session shall thereupon hear the objections, and is hereby authorized to pass upon all questions involved, and determine the amount of damages, if any, which will be incurred by the owner in case said cedar trees are destroyed, and the costs incurred or to be incurred in cutting down trees under section eight hundred and eighty-six. If the court should find any damages or such expense sustained, he shall order the amount so ascertained to be paid to the owner by the treasurer of the county out of the general fund of said county, and such order shall be entered by the clerk in the law order book of the said court.

SECTION 892. Whenever the court orders any damages paid out of the general fund of the county under the preceding section, or the county treasurer makes any payments out of the general fund of the county under section eight hundred and eighty-nine, the said county shall be reimbursed by a specific levy of not exceeding one dollar and fifty cents per acre on all apple orchards planted ten years or more, and not exceeding fifty cents per acre on all orchards planted more than two years and less than ten years, in each magisterial district in which this law shall have become operative as hereinafter provided, but in the county of Shenandoah, the said county fund shall be reimbursed by a specific levy of not exceeding three dollars per acre on all orchards planted ten years or more, and not exceeding one dollar and fifty cents per acre on all orchards planted more than two years or less than ten years in each magisterial district in which this law shall become operative as hereinafter provided, if a single levy does not provide a sufficient fund to reimburse the county fund for the amounts paid out, as aforesaid, the levy may be repeated from time to time until the county fund is restored, but not more than one levy shall be made in any one year in the same district. The court awarding damages shall direct the commissioner of the revenue for the district or districts in which the law has become operative, to report at the next annual assessment the names of all owners of apple orchards over two years old and less than ten years old, and all owners of apple orchards over ten years old, in such district or districts, together with the number of acres owned by each person.

The court shall thereupon fix such specific amount per acre to be paid by each owner as will in the aggregate net the amount necessary to reimburse the county fund for all damages, and costs previously paid out under the provisions thereof.

The court shall enter an order directing each owner to pay his respective portion so ascertained to the county treasurer, and such order shall have the force and effect of a judgment of the court; if said amounts are not paid within thirty days from the date of said order the county treasurer shall proceed to collect the same as taxes are collected; provided, however, that all damages awarded

and assessments made therefor shall be by magisterial districts, each district bearing its own expense in the enforcement of this chapter; provided, further, that any orchard owner who is aggrieved by an erroneous levy or assessment made against him under this section, may apply by motion for relief against the same at the court that ordered the levy, at any time within twelve months after the date of the order ascertaining the amount to be paid by the several owners and directing payment; and if the court is satisfied that the applicant is erroneously assessed in such levy, either in whole or in part, it shall correct the same, directing that the applicant be exonerated from so much as is erroneously charged against him, if it is not already paid, and if paid that it be refunded to him.

Such motion shall be after five days' notice to the attorney for the Commonwealth, who shall represent the county at the hearing.

The amount fixed by the court upon orchards planted more than two and less than ten years shall be one-half the amount fixed by the court as a charge upon orchards planted ten years or more.

SECTION 893. The eight preceding sections shall not be in force in any county or in any magisterial district of any county until the board of supervisors thereof shall by a recorded vote accept and adopt the same for their county or magisterial district in their county, and such acceptance and adoption shall not make the same operative unless the circuit court of such county by an order duly entered shall ratify and approve the action of the board.

In the event the board of supervisors of any county neglect or refuse to accept and adopt the same for their county, or for any magisterial district of their county, then the majority of the qualified voters of said county or any magisterial district of said county, may request its adoption by petition addressed to the circuit court of said county, and when it appears from said petition that a majority of the qualified voters of said county or any magisterial district of said county request the adoption of said sections, then the said court shall declare the same adopted for such county, or for any magisterial district in such county, requesting their adoption.

An ACT to amend and re-enact section 885 of the Code of Virginia.

Approved March 16, 1920.

Acts, 1920, p. 370.

1. Be it enacted by the General Assembly of Virginia, That section eight hundred and eighty-five of the Code of Virginia be amended and re-enacted so as to read as follows:

Sec. 885. Red cedar trees; declared public nuisance, when.—It shall hereafter be unlawful within this State for any person, firm or corporation to own, plant or keep alive and standing upon his or its premises, any red cedar tree, or trees (which are or may be) the source, harbor or host plant for the communicable plant disease commonly known as "orange" or "cedar rust," of the apple, and any such cedar trees, when growing within a radius of two miles of any apple orchard in this State, are hereby declared a public nuisance and shall be destroyed as hereinafter provided, and it shall be the duty of the owner or owners of any such cedar trees to destroy the same as soon as they are directed to do so by the State Entomologist, as hereinafter provided.

FILED
JAN 11 1928
CHARLES ELMORE CROPLEY
CLERK

No. 199

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

JULIA V. MILLER, &c.,
Plaintiffs-in-Error,

vs.

W. J. SCHOENE,
State Entomologist of Virginia
Defendant-in-Error.

BRIEF FOR DEFENDENT-IN-ERROR

BRIEF FOR DEFENDANT-IN-ERROR

JOHN R. SAUNDERS, *Attorney General*

P. S. TAVENNER, *Counsel for Defendant-in-Error*

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STATEMENT OF FACTS

The original Cedar Rust Law was enacted in 1914, and was reenacted in the Code of 1919. In 1920, (Acts 1920, p. 370); in 1922, (Acts 1922, p 246), in 1924 (Acts 1924 p. 47), the Act was before the Legislature and amended.

Under the Act, the petition was filed before the State Entomologist by ten freeholders of the magisterial district requesting the State Entomologist to make a preliminary investigation to ascertain if the lands in the territory sought to be investigated contained cedar trees constituting the

host plant of the disease known as Cedar Rust disease, and whether the cedars if so found were a menace to the apple orchards within the two mile radius of the orchards. The State Entomologist made his preliminary examination and ascertained that the plaintiffs-in-error did own red cedars within said radius, and that the cedars were a menace to the health of said apple orchards, and accordingly as provided by the Act notified the plaintiffs-in-error of his finding and directed plaintiffs-in-error, as further provided by the Act, to cut down the red cedars, and thus abate the nuisance. (R. 41, 43.

The plaintiffs-in-error exercised, as they were entitled to do under the law, their right to take an appeal from the decision of the State Entomologist to the Circuit Court, (R 54), and there they presented their defenses, (R. 45), and the decision of the said court being unsatisfactory to them, they applied for a writ of error to the Supreme Court of Appeals, from whose decision they applied for a writ of error to the Supreme Court of the United States.

The cedar rust is a disease that first manifested itself viciously in the early years of this century, (R. 48), and has increased in virulence, until now successful apple production in proximity to the red cedar has become an impossibility. (R. 73, 74, 76, 78, 88, 92, 100, 109.) The apple industry it is shown will soon become extinct in the vicinity of cedars, if the cedar rust disease cannot be put and kept under control.

It has been demonstrated beyond successful contradiction that the cedar rust is a disease, and that its spores spend their existence, in part on the cedar tree and in part on the apple tree, and that it cannot exist in the absence of either the cedar tree or apple tree. The life cycle of the spores has been studied and definitely learned. (R. 49, 117.) The disease originally and until comparatively recent years lived alternately upon the wild crab apple and the cedar tree and only recently adapted itself also to the cultivated apple—at first to a few varieties, and now no variety may be said to be perfectly immune, while many varieties are being for all practical purposes destroyed. (R. 100, 118, 119.)

The disease attacks both fruit and foliage of the apple trees. (R. 48.) The foliage of some of the best varieties such as York Imperial and Jonathan is destroyed in mid summer and early fall; (R. 50) the fruit fails to mature and is worthless except to enlarge the unprofitable cull pile; (R. 73, 100), and the trees deprived of their power to breathe through their leaves, fail to continue their growth. (R. 51.) The disease is a disease of both the apple tree and the cedar tree. (R. 51.)

The Cedar Rust disease is carried by the atmosphere from the cedar galls ("cedar balls") in spring and early summer to the apple trees. (R. 119.) The zone of infection depends upon weather conditions and the direction of the winds. Removal of the cedar trees within a radius of two miles has been so far found to afford reasonable protec-

tion against ordinary outbreaks of the infection, though injury occurs during years favorable to the disease well beyond this distance. (R. 50.) The intensity of the disease depends upon distance from source of infection.

The spores from the cedars pass their summer existence on the apple and apple foliage and their remaining existence upon the cedar, being carried from one host plant to the other by favorable atmosphere, so that a large body of red cedars may have the capacity of deluging orchards with the disease spores, to be carried on to other cedar trees, and from the latter to still other apple orchards, constituting a possible link in an endless and destroying chain covering the area of the joint occupancy of land by the red cedar and the apple tree. (R. 49.)

The orchard industry in the Valley of Virginia is very valuable and extensive. (R. 69, 92, 105, 129.) In Frederick County, it has been described as the largest agricultural industry (R. 68.) Virginia whose apple producing territory is confined largely to the Valley of Virginia, ranks 3rd or 4th in production among the States of the Union. (R. 116.) Near New Market, the southern end of Shenandoah County, and within a few miles of the Miller cedars are to be found some of the largest orchards in the State. (R. 92, 126.) Within a radius of 1 mile of the Miller cedars is one orchard of about 25 acres and 4 or 5 smaller orchards, all of which are rendered worthless. Within a radius of 2 miles there are other orchards, includ-

ing the Driver orchard of about 20 acres, and a short distance beyond, numerous other orchards very large in size. (R. 92, 125, 126, 132, 133.) The lands in the New Market territory are especially well adapted to apple growing. (R. 71, 92, 105, 106, 107.)

Among the industries made necessary by the large apple production in the Valley section may be mentioned large cold storage houses—the city of Winchester alone having two storage plants with a combined capacity of a half million barrels and the largest apple canning and apple by-product plant in the World. (R. 69.) Railroads are necessarily kept busy in apple seasons, and a very large number of men and their families are given employment in the production, harvesting and marketing of the fruit, and in the allied industries. (R. 64, 93.)

The food value of the quantities of fruit consumed at home, and placed upon the markets, domestic and foreign, is very great, and practically beyond computation.

The value of farm lands for all practical purposes is increased by the removal of the cedars, the harbor and source of the infection (R. 66, 67, 71, 84, 87, 93, 101, 107, 123, 124), and the territory becomes more attractive and valuable for those living there, while the county and state treasuries are gathering increasing revenues from the increased production and enhanced land values. (R. 72, 78, 79, 81.)

The cedar trees are indigenous to the Valley lands. Their value, as shown by the evidence, is negligible in general, and equally so in this particular case. (R. 90, 131, 125.) The trees are not grown commercially, and from the testimony of witnesses of plaintiffs-in-error and others the cedar trees and cedar bushes on the lands are of no substantial value, and are not comparable in value to the apple orchards. (R. 127, 131.)

The cedar trees sought to be cut down consist of about 215 small and large, 2 1-2 to 10 inches in diameter, distributed along both sides of a roadway, with fields on both sides; a small cedar grove of about two acres; about 148 more in a lot of 4 to 6 acres, and several hundred cedar bushes scattered in the fields that have been permitted to encumber the ground, and a few trees elsewhere. (R. 121.)

The cedar trees are similar to those of apparently same size and condition in the vicinity and are generally doted. (R. 124, 125.) The lumber value of the cedars as shown by plaintiffs-in-error themselves is negligible, the six inch size, for a single cut having a sale value as lumber of about 12 cents at most, which price would include cost of cutting, logging, hauling, sawing and marketing.

But whatever the cedars are actually worth when cut down, the plaintiffs-in-error are not deprived of the material. Not a stick of the cedar tree is taken by the Entomologist.

To control the disease, and as the only method of control, the cedars must be cut down, but in

abating the nuisance, the least practicable injury is done. Thus, the trees are cut down without cost to the cedar tree owner; the trees are trimmed closely, and to the size of 2 inches at the small end; the limbs likewise trimmed into wood and down to the size of 2 inches; the brush are piled, and even burned if desired; and in addition an allowance is made to the cedar tree owner for any incidental injury done to the land, in the cutting down of the cedar trees, and in superintending the work. (R. 153.)

The actual cost of cutting down all the red cedars, and doing all the work carefully, as provided by the order, would be in the instant case approximately $150.00, which will give some further idea of the few cedars that are to be removed. (R. 98, 103.)

The court in the case of Bowman v. Entomologist, makes it a matter of common knowledge that the cedar trees in the Valley are of very little value for any purpose, and are actually negligible commercially in value, and the evidence shows this to be especially true in present case. (R. 124, 125.)

The actual value of the cedars was de minimis; the removal of the cedars enhanced the actual value of the land for grazing and other farm purposes. The order provides payment to plaintiffs-in-error for the compensation as provided by the act as construed by our highest court. (R. 144, 145, 147, 152.)

THE ARGUMENT

The Act of 1914, as amended from time to time to 1924, and its continued existence upon the statute books of the state, is a plain and impressive recognition of the importance of apple growing in Virginia, and the public necessity for its protection and development. The Act as amended from time to time and as construed by the Supreme Court of Appeals of Virginia, provides fairly and reasonably for the exercise of the police power of the state, to save a great agricultural industry of the state, and is not amenable to the contention that it in any way contravenes Sec. 1, of the Fourteenth Amendment.

Defendant-in-error relies upon the right to the construction placed upon the statute by the Supreme Court of Appeals upon the statutes and insists the following matters have been determined and concluded thereby:

(a) That all cedar trees are a menace, or may be a menace, to apple orchards in proximity to cedar trees.

(b) The measure of damages contemplated by the statute.

(c) The meaning of "freeholders" and "locality" as employed in the statute.

(d) The meaning intended b ythe Legislature to be conveyed by the word "orchard" and that the term "orchard" contemplated orchards shown to

have been within the 1 mile and 2 mile limit of the Miller cedars.

THE STATUTE IS NOT REPUGNANT TO THE FOURTEENTH AMENDMENT

The contention of plaintiff is that the act is repugnant to Sec. 1, of the Fourteenth Amendment, that is to say:

(1) That it deprives plaintiff's-in-error of their property, without due proces sof law; and

(2) That it denies plaintiffs-in-error of the equal protection of the laws.

These propositions are set forth in varying forms in their assignment of errors.

EFFECT OF STATE SUPREME COURT'S INTERPRETATION OF STATUTE

American Railway Express Co. v. Kentucky, U. S., 71 L. Ed. (Adv. 457.) Edward Hines Yellow Pine Trustees v. Martin, U. S. 71 L. Ed. (Adv. 607.) North Loraimie Land Co. v. Hoffman, 268 U. S. 282, 69 L. Ed. 563. Fidelity Nat. Bank & T. Co. v. Swope, U. S., 71 L. Ed. (Adv. 559.) Charles H. Graves, Plaintiff v. State of Minnesota, U. S., 71 L. Ed. (Adv. 143, 145.) Herbert v. Louisiana, U. S. 71, L. Ed. (Adv. 113.)

The record of this case shows that the petition containing at least 10 qualified freeholders of Lee Magisterial District was presented to the State Entomologist; that the Entomologist made pursuant thereto a preliminary investigation to ascertain whether there existed red cedars within the prescribed area, constituting a menace to the orchards of the locality; that the State Entomologist duly made the investigation, and finding that the plaintiffs-in-error owned cedars within the proscribed area constituting the host plant of the disease, and a menace to the apple orchards, also duly notified, as provided by the statute, the plaintiffs-in-error of the result of his investigation, and directed the owner to cut down within a specified time the offending cedars; that an appeal, as provided by the act, was promptly taken by plaintiffs-in-error, and a full and fair trial was had before the Circuit Court where the plaintiffs-in-error presented their objections and defenses to the proceeding; that plaintiffs-in-error have not been deprived of their property without due process of law, nor have they in any sense been denied the equal protection of the law.

Defendant-in-error insists that the Cedar Rust Act provides for the reasonable exercise of the police power of the state for the control of the cedar rust disease; that there exists a perfectly reasonable relation between the character of the legislation and the policy to be subserved; and that the act does not provide for "an warranted and arbitrary interference" with the constitutional

rights of plaintiffs-in-error; but that on the other hand it does provide, as do similar acts of other states, for the reasonable exercise by the state of the police power of the state, for the control of a disease, which if not eradicated o rcontrolled will certainly result in the extinction of the orchard industry—one of the leading agricultural industries in Virginia.

I.

PLAINTIFFS' CONTENTION THAT THE STATUTE IS INVALID IN THAT IT PROVIDES FOR THE TAKING OF PRIVATE PROPERTY, NOT FOR PUBLIC USE, BUT FOR THE BENEFIT OF OTHER PRIVATE PERSONS.

This contention will be considered more fully in connection with centention of Plaintiffs-in-Error II. In refutation of this contention defendant at this point cites:

Bowman v. Entomologist, 128 Va. 351; 105 S. E. 141; 12 A. L. R. 1121, and annotation; Kelleher v. Schoene, 14 F. (2l.) 347; Kelleher v. French, 22 F. (2d.) 343; Balch v. Glenn (Kans.), 43 L. R. A. (N. S.) 1080; Los Angeles County v. Spencer (Cal,) 77 Am. St. R. 217; State v. Main (Conn.), 36 L. R. A. 523; Colville v. Fox (Mont.) L. R. A. 1915 F. 894; Louisiana State Board v. Tanzmann, L. R. A. 1917 C 894.

II.

THE CONTENTION THAT THE ACT CANNOT BE SUSTAINED AS A LEGITIMATE EXERCISE OF THE POLICE POWER

It is true, as state dby plaintiffs-in-error, that defendant-in-error contends, as the basis of the proceeding that the state has the right to cut down the cedar trees in the exercise of the police power; and defendant-in-error insists that reasonable regulations, whether under crop pest or special laws enacted to prevent infection of trees and orchards have uniformly been held everywhere to be within the police power. It is not contended, of course, that one man's property may be taken for the benefit of others, but it is contended that in the enjoyment of property the owner shall not use it in a way as to endanger the rights and property of others. The evidence in this case discloses that the plaintiffs-in-error are maintaining a constant menace to the orchard business and thus to the general welfare. It is insisted that they have no more right to use their land in growing such trees, than to use it to keep cattle afflicted with or exposed to "foot and mouth" disease, or for maintaining any other business which endangers the safety, morals, health or general welfare of the community. Kelleher v. French Vol. 22 (2) 343.

In the annotation to case of Bowman v. Entomologist, 12 A. L. R. 1136 (128 Va. 353, the editor

recognizes generally the constitutionality of similar acts in the following language:

> "It is well established as a general proposition of law that reasonable regulations enacted to prevent the spread of weeds or noxious vegetation, and to ***prevent the infection of trees, orchards and crops,*** are within the police power of the state."

And again at page 1138, the editor further stated, without a suggestion of doubt or uncertainty:

> "Statutes enacted for the ***purpose of protecting orchards,*** trees and crops from contagious and infectious diseases have uniformly been held to be within the police power of the state, and their constitutionality has been sustained, except in several instances where the particular statutes failed for some reason to meet constitutional requirements."

In 1920, the case of Bowman v. Entomologist was decided by the Supreme Court of Appeals. From that date for seven years the correctness of that decision has not been successfully challenged, and under the law as construed, large areas of lands have been relieved of the menace. (R. 78, 80, 83, 95, 101, 110, 152.)

In that case (p. 370, 1), the court said:

"That the destruction of the red cedar in said sections which thus constitute a menace to the apple trees is absolutely necessary to prevent the extinction therein of the apple industry. That they are not planted or cultivated but are indigenous to the soil, springing up where the soil is not cultivated and growing wild. That they are valuable only when they have attained a sufficient size to make posts or fuel x x x Under the statute in question, all of the posts of the trees available for fuel o rfence posts are left undestroyed and remain the property of the owners x x x. ***Certainly as compared wit hthe value of the apple trees to which their existence is a serious menace, their value is de minimis.***"

Kelleher v. Schoene, 14 Fed. (2d) 348—

"All property rights are held subject to the fair exercise of the power to make regulations that are reasonably necessary to secure the welfare of the community. If the regulation is not capricious, arbitrary or unjustly discriminatory, and the means employed have a real relation to the ostensible purpose, the statute may be a valid exercise of the police power. x x x The fact that only one class, the owners of infected red cedar trees are injured by the statute does not deny the equal protection of the laws, since all of such owners are equally subject to the law."

Lawton v. Steele—

162 U. S. 136, 38 L. Ed. 388:

"The extent and limit of what is known as the police power have been a fruitful subject of discussion in the Appellate Courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, x x x Beyond this however, the state may interfere wherever the public interests demand it, and in this particular case a large discretion is necessarily vested in the legislature to ***determine not only what the interests of the public require, but what measures*** are necessary for the protection of such interests."

Bacon v. Walker,

204 U. S. 317, 51 L. Ed. 502:

"These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a state, and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. Ed. 596, 609, 26 Sup. Ct. Rep. 341. In that case ***we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed***

to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. We do not enter, therefore, into the discussion whether the sheep industry is legitimate, and not offensive. Nor need we make extended commend on the 2-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit. The mere distance expressed shows nothing.

"This view of the power of the state, however, is too narrow. That power is not confined, as we have said, to the suppression of what is offensive, disorderly, or unsanitary. ***It extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people.*** This is the principle of the cases which we have cited." Buchanan v. Worley—

245 U. S. 74, 62 L. Ed. 74:

"The authority of the state to pass laws in the exercise of the police power having for their object the protection of the public health, safety and ***welfare,*** is very broad, as has been affirmed in numerous and recent decisions of this court. Furthermore, the exercise

of this power, embracing nearly all legislation of a local character, ***is not to be interfered with by the courts where it is within the scope of legislative*** authority, and the means adopted reasonably ***tend to accomplish a lawful purpose.***"

Thomas Cusack Co. v. Chicago,

242 U. S. 530, 61 L. Ed. 475:

"We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision, the limits of the police power, yet the disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the Judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will ***interfere with*** the action of such authority ***only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals or to the general welfare.***

Chicago, B. & Q. R. Co. v. Illinois—

200 U. S. 592, 50 L. Ed. 609:

"We hold that the police power of a state

embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 292, 43 L. Ed. 702, 704, 19 Sup. Ct. Rep. 465; Gilman v. Philadelphia, 3 Wall. 713, 729, 18 L. Ed. 96, 100; Pound v. Turck, 95 U. S. 459, 464, 24 L. Ed. 525, 527, x x x And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose."
id. 594, L. Ed. 610:

"But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly evistence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given."

Bowman v. Entomologist: 128 Va. 360,

"Is the act x x x valid as enacted under the police power of the state, for the protection of the public interest, and is it a valid exercise of such power?"

"This question must be answered in the affirmative."

Concerning the opinion in the Bowman case in its discussion of the due process and equal protection clauses of the 14th Amendment, Judge McDowell, in Kelleher v. Schoene, p. 346, said:

"While we regard the opinion in the Bowman case as well reasoned, it is in respect to the federal constitutional question merely persuasive, and the plaintiff is entitled to have the independent judgment of this court as to these questions."

Corpus Juris, Vol. 12, p. 904:

"As applied to the powers of the states of the American Union, the term is also used to denote those inherent governmental powers which, under the federal system established by the constitution of the United States are reserved to the several states." (Section 412).

"The police power is to be clearly distinguished from the right of eminent domain;

and the distinction lies in this, that in the exercise of the latter right, private property is taken for public use and the owner is invariably entitled to compensation therefor. While the ***police power*** is usually exercised merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, ***it is not taken for public use, but rather destroyed in order to promote the general welfare of the public, and in neither case is the owner entitled to any compensation for any injury which he may*** sustain in consequence thereof" &c. (Sec. 413.)
Ruling Case Law, Vol. 6, p. 189:

"The police power of the state, never having been exactly defined or circumscribed by fixed limits, is considered as being capable of development and modification within certain limits, so that the powers of government control may be adequate to meet changing social, economic and political conditions. It is very broad and comprehensive and is liberally understood and applied. The ***changing conditions of society make it imperative for the state to exercise additional powers,*** and the welfare of society may demand that the state should assume such powers."
id 206:

"The police power extends to the enactment of all such wholesome and reasonable laws, not inconflict with the Constitution of

the state or the United States as they may deem conducive to the public good. This may ***include legislation to increase industries of the state, develop its resources,*** and add to its welfare and prosperity."

Ruling Case Law, Vol. 1, p. 790:

"While in a strict sense this discretion is judicial in its nature, it does not constitute a delegation of 'judicial powers' within the meaning of the usual constitutional inhibition against the delegation of judicial powers to an administrative officer. Consequently, statutes providing for the summary destruction of vegetation infected with contagious pests, without any prelimianry judicial inquiry and without compensating the owner for the resulting loss, are perfectly constitutional so long as they themselves define what constitutes a nuisance, and there is a right to a subsequent judicial review of the action of the administrative officer. A property thus destroyed is confiscated under the police power of the state, the owner thereof is not entitled to be compensated as a matter of right."

Lewis on Eminent Domain—3d. Ed., Sec. 6:

"Whatever restraints the legislature imposes upon the use and enjoyment of property withing the reason and principle of this duty, the owner must submit to, ***and for any inconvenience or loss which he sustains thereby, he is without remedy. It is a regulation, and not***

a taking, an exercise of police power and not of eminent domain. To destroy property because it is a public nuisance is not to appropriate it to a public use, but to prevent any use of it by the owner, and to put an end to its existence, because it could not be used consistently with the maxim sic utre tuo ut alienum non laedas."

American State Reports, Vol. 77, p. 221:

"The lesiglature has the power to enlarge the category of public nuisances by declaring places or property used to the detriment of public interests or to the injury of the health, morals or welfare of the community, to be nuisances, ***although not such at common law.***"

Mugler v. Kansas, 123 U. S. 623; Noble State Bank v. Harkell, 219 U. S. 104, 55 L. Ed. 112; Eubank v. Richmond, 226 U. S. 142, 57 L. Ed. 158; Fertilizer v. Hyde Park, 97 U. S. 650; Encyclopedia Supreme Ct. Reports, Vol. 9, p. 473, 475.

Louisiana State Board v. Tanzmann,

L. R. A. 1917 C 894:

"The owners of the other groves are entitled to protection now before the destruction emanating from defendant's place overtakes their groves."

Balch v. Glenn,

L. R. A. (N. S.) 1080, 119 Pac. 67 (Kansas) (syllabus)

"The statute is designed to protect and promote the horticultural interests of the state, and in effect makes all orchards, trees, shrubs and plants infested with the pests mentioned, in the statute, public nuisances, and being a proper exercise of the police power, it is not unconstittuional because it authorizes the expense of abating such nuisances to be charged against the property of the owner."

"The statute is not invalid because it delegates to the commisison the power to declare the existence of conditions which call into operation the provisions of the statute."
County of Los Angeles v. Spencer,

126 California 670, 77 Am. St. R. 220:

"It is well known that the existence of the fruit industry in the state depends upon the suppression and destruction of the pests mentioned in the statute. The act in question is, therefore, a proper exercise of the police power." x x x

Louisiana State Board v. Tanzmann,

Ann. Cases 1917 E 217, 73 So. 854 (syllabus):

"The destruction by legislative authority

of orange trees affected by a disease for which no cure has been discovered, and which is highly contagious and infectious ,is not a taking of such property without due process of law, but is a competent exercise of the police power of the state."

State v. Maine,

37 Atl. 89, 61 Am. St. Rep. 30:

In that case it was held that the statute requiring the destruction of peach trees infected with a disease known as "Yellows" without compensation, was a proper exercise of the Police Power.

Howard v. State,

242 S. W. 818, 154 Ark. 430:

In that case, the plaintiff-in-error was ordered, under regulations promulgated by the Crop Pest Board, to cut down his cedar trees, at his own expense. Under the law, a penalty was authorized and plaintiff-in-error refusing to carry out the order for the cutting of the cedars, was convicted in the lower court, and upon appeal, the judgment of the lower court was affirmed, with apparently every possible assignment of error made.

Other authorities—

Constitution, Article X.:

Hamilton v. Kentucky Distillery Co., 251 U. S. 156, 64 L. Ed. 199;

Purity Extract Co. v. Lynch, 226 U. S. 192, 57 L. Ed. 184;

Schmindingre v. Chicago, 226 U. S. 578, 57 L. Ed. 364;

Colvill v. Fox, 149 Pac. 496, L. R. A. (N. S. 1915 F 895;

Wedemyer v. Crouch, 43 L. R. A. (N. S.) 1080;

Noble State Bank v. Haskall, 219 U. S. 104, 55 L. Ed. 112;

Arkansas v. Kansas T. & Coal Co., 183, N. S. 189, 46 L. Ed. 146.

Nor is there anything in the cases cited by plaintiffs-in-error that militate against the contention of defendant-in-error.

Lockner v. New York, 198 U. S. 45, and Dobbins v. Los Angeles, 195 U. S. 233, and other cases cited, in no way seem to be at variance with the other cases cited by defendant-in-error.

In the case of Penna. Coal Co. v. Mahon, 260 U. S. 393, is not in point. In that case, the owner of land, sold the surface, and retained the underlying coal, with right to mine it. The Legislature had enacted a law prohibiting the mining of coal under private dwelling or streets or in cities in places where the right to mine such coal was reserved by the mine owner in the grant of the surface. The court by a majority opinion held that the effect of the act was to deprive the mine owner o fthis private property without due process of law, and that

as a regulatory statute the law went too far, and was taking of property for which compensation should be made, and while manifestly a close case, by the majority opinion of the court, the statute was declared as extending authority beyond the reasonable exercise of the police power of the state.

The decision is certainly not in point to maintain that a few scattering cedar trees of very little if any substantial value, should be permitted to stand when containing disease spores of the most virulent type at the point of annihilating a very necessary and valuable industry of this and other states.

As hereinabove suggested, the legislation is not novel. Among the states that are controlling or have the power to control the disease by cutting down of the cedars, whether under special act or crop pest regulations, are: Arkansas, New York, Illinois, West Virginia and Pennsylvania, and it is not believed any case will be cited showing a similar act to have been declared unconstitutional by any court.

In addition to what has been said, in answer to the contention that the act is not a proper exercise of the police power of the state, reference is further made to Bowman v. Entomologist, 128 Va. 351, 105 S. E. 141; 12 A. L. R. 1121.

III.

CONTENTION THAT THE CONTROL OF PROPERTY OF PLAINTIFFS-IN-ERROR IS NOT EXERCISED UNDER THE STATUTE, BY OTHER OWNERS OF PROPERTY

The statute in providing that it should be necessary to have ten freeholders in the unit consisting of the district or county, as the case may be, evidently contemplated that there should not be an arbitrary and unnecessary demand upon the Entomologist, and that this provision should at least be a guaranty of good faith in any request for an investigation.

All that the 10, instead of 1, could do was to request a "preliminary investigation." These 10 had no controlling power except to require an investigation to be made. If 10 freeholders cannot be found willing to have an investigation made, and the cedars cut and expense borne by the orchardists of the district or county, as the case may be, it would be quite convincing that the cedars should not be cut.

The argument raised by the plaintiffs-in-error against some personal setting in motion of the machinery would apply in other cases—civil and minor criminal matters. In ordinary practice, the building of new roads, and new bridges, is instituted by a petition.

But the draftsman of the Cedar Rust Act must have had before him, the provision of the Code of Virginia relating to abatement of nuisances, the constitutionality of which will hardly be doubted. That act provides as follows:

> "When complaint is made to the Circuit Court of any county, or the corporation court of any city of this state, by five or more citizens of any county, city or town, setting forth the existence of a public or common nuisance, the court or Judge thereof in vacation shall summon a special grand jury x x x to investigate such complaint; and if upon a full investigation of such complaint the grand jury is satisfied" &c.

This statute was declared constitutional in Jeremy Improvement Co. v. Commonwealth, 106 Va. 482, 56 S. E. 224.

Judge Parker, Circuit Judge in Kelleher v. French, 22 F. (2d.) 343, says:

> "In this respect the procedure is analogous to that prescribed by section 1520 of the Code of Virginia relating to public nuisances, which provides that upon complaint of five or more citizens of a county that a public nuisance exists therein, a special grand jury shall

be summoned to investigate the complaint, and if found to exist to institute proceedings looking to the abatement."

Judge McDowell in Kelleher v. Schoene, 14 F. (2d.) 347, uses this pertinent language:

> "So long as a request is not signed by 10 freeholders, the owner of cedar trees remains undisturbed, and the signing of a request does not determine anything except that at least 10 freeholders desire that an official search for infected cedar trees be made in some designated territory. The provision in question tends to protect the owners of cedar trese from possible official overzealousness, as well as the orchardists from the ultimate payment of damages and expenses, incurred in the possibly unnecessary destruction of the trees."

In the case of Eubank v. Richmond, 226 U. S. 137, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, is relied upon by plaintiffs-in-error, in their contention that this provision of the statute denies to them due process and equal protection of the law; but defendant-in-error contends that there is a wide difference between the two cases.

In the Eubank case, the Supreme Court held invalid a city ordinance which required the committee on streets of the city to establish a building line upon the request of two-thirds of the property owners abutting on the street, and inhibited the erection of any building beyond the building line thus established.

The Supreme Court of Virginia, referring to Eubank case and quoting Kelleher v. Schoene (R. 164,) said:

> "This statute differs so widely from the ordinance involved in Eubank v. Richmond x x x and from the statutes in the other cases cited by counsel for plaintiff, that we think it profitless to discuss these cases."

Judge Parker, in Kelleher v. French, 22 F. (2d) 343, with reference to the Eubank case, said:

> "It is manifest that the principle decided in that case has no application to the case at bar. The only similarity between the two cases is that in each case, the statute provides for action by public authorities upon request of property owners. In the Eubank case, however, the request of the property owners was mandatory, and the action by the public authorities merely carried out their will. Here the request of the freeholders merely imposes upon the State Entomologist the duty of making inquiry and does not control the action."

In North Laramie Land Co. v. Hoffman, 268 U. S. 282, 69 L. Ed. 957, the court said:

> "The supreme court of Wyoming held that the procedure followed complied with the statutory requirements. By that determination we are bound. x x x In consequence, it has

been uniformly held that statutes providing for ***taxation or condemnation of land may adopt a procedure, summary in character,*** and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject-matter, and afford to the property owner reasonable opportunity, at some stage of the proceedings, to protect his property from an arbitrary or unjust appropriation."

IV.

CONTENTION THAT THE STATUTE IS VOID FOR VAGUENESS AND UNCERTAINTY

This contention appears to be based upon the alleged uncertainty as to who are contemplated by the statute as eligible "freeholders."

The Supreme Court of Appeals necessarily determined that in the present case the petitioners applying to the Entomologist were those contemplated by the statute. That no reliance was made by plaintiffs-in-error, that the petitioners were not eligible to sign, or that any question could be raised as to the sufficiency of the freeholders or the petition, is manifest from the "Stipulation" in the trial court (R. 47), as follows:

"It is stipulated between counsel that counsel for the defendant waive the introduction of evidence to show that the petition upon which the notice to the defendant from the State Entomologist is founded was properly signed by the requisite number of freeholders; and waive any right to raise any question predicated upon the lack of such proof."

But regardless of the binding force of the decision of the Supreme Court of Appeals, and of the Stipulation of parties, it is insisted that there is no uncertainty as to what is meant by the word "freeholders," or who were intended to be included as applicable to this case.

Section 893 of the Code provides that the Act shall not be inforce until the Board of Supervisors of any County shall by a recorded vote adopt the same for ***their county or magisterial district in their county.***

Sec. 886 says:

"In ***any county in the state,*** where the above mentioned disease exists x x x upon the request in writing of 10 or more reputable freeholders of any County or magisterial district to make a preliminary investigation of the locality from which said request is received" &c.

It cannot, therefore, be fairly contended that the statute contemplated that persons owning real estate anywhere outside of the state would have the right to petition, or that the use of the word "freeholders" as employed in the statute renders the act unconstitutional, on the ground of vagueness or uncertainty.

V.

THE CONTENTION THAT THE ACT IS IN VIOLATION OF THE CONSTITUTION, BY REASON OF ALLEGED UNCERTANTY OF THE WORD "LOCALITY"

Bearing in mind that the purpose of the petition is only to start an investigation, it is plain that the word "locality" when used in that connection related to the territory within two miles of an apple orchard. The direction by the petitioners is necessarily general, and when the investigation has been made, the proceeding to cause the removal of the cedars is commenced by notice of the Entomologist to the cedar tree owner.

Judge Burke, speaking for the court (R. 165) well says:

> "Aside from the fact that this assignment is concluded by the Bowman case, we do not

think there is any doubt or uncertainty about the use of the word 'locality' in that section. The statute is to be read as a whole, and when so read, it is fairly plain, that what was to be investigated was the existence of the infected red cedar trees within two miles of an apple orchard x x x The location of the cedars and their distance from an apple orchard or orchards, is the subject of investigation and this is the locality referred to in the statute."

And the court quotes Judge McDowell, speaking for the court in Kelleher v. Schoene (R. 165), as follows:

"A reasonable construction of the statute as a whole requires that the signers of any request to the Entomologist must own estates of freehold in the county or district, as the case may be, x x x and does not mean that the freeholders who sign, must reside in, or must own estates lying in any particular 'locality'."

VI.

THE CONTENTION THAT THE ACT IS UNCONSTITUTIONAL BECAUSE OF UNCERTAINTY IN MEANING OF WORD 'ORCHARD'.

The meaning of the word orchard is common-

ly well known. But the highest State Court having necessarily construed the word to include the apple trees sought to be protected in the case, the construction should for the purposes of this case be accepted.

As was said by Circuit Judge Parker, speaking for the Court (22 F. (2d.) 344(:

> "The next point is that the statute is invalid because of vagueness and indefiniteness. The contention is based upon the use of the words 'orchard' and 'locality,' and may be disposed of in a few words. The word 'orchard' has always had a well understood meaning and the use of such a term could not possibly render the statute void for vagueness" &c.

VII.

THE CONTENTION THAT PRIVATE PROPERTY IS TAKEN UNDER GUISE OF POLICE POWER FOR PUBLIC USE WITHOUT COMPENSATION.

No successful effort was made by plaintiffs-in-error to show that the cedars sought to be cut down as necessary to eradicate the cedar rust, possessed any appreciable value. The trees on the Mil-

ler lands were on the other hand shown affirmatively to be inconsequential. Our courts have accepted it as a matter of common knowledge that the red cedar trees possess a negligible value, and in the instant case, in the assignment of error, there is no assertion that the trees in themselves do possess any appreciable value.

The question, of course, we must remember is not whether the court construed the act properly, but whether with the construction given, the act is in violation of Sec. 1, of the Fourteenth Amendment.

Chicago &c. R. R. Co. v. Illinois, 200 U. S. 592, 57 L. Ed. 593, is quoted by plaintiffs-in-error; but continuing further the quotation is found at bottom of page 593 in the following language:

> "Upon the general subject, there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular cases within the true meaning of the Constitution, a 'taking' of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation on account of such injury, does not attach under the Con-

stitution. Such is the present case. There are unquestionably limitations upon the exercise of the police power which cannot under any circumstances be ignored. But the clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. ***It has always been hold that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given.***"

In Bowman v. Entomologist, 128 Va. 360, decided nearly 8 years ago, the court held that the cedar tree owner was not entitled to compensation "as a matter of right," that is to say, he was only entitled to received that which the statute provided he should be paid. This decision has become a rule of property. Under the law, the cedar trees in the large orchard areas of the Valley have been cut down. Nor have plaintiffs-in-error shown any good reason why the owner of the offending cedars should be entitled to compensation other than such as is specifically allowed by the act, for maintaining what the Legislature 13 years ago declared to be a public nuisance, and should be rendered harmless. No land is taken. The cedar trees

are cut down, but their products are not taken from the property; the trees are cut down, trimmed, the poles saved for the cedar tree owner; the wood trimmed out for him, and a small allowance made him as a compensation for incidental damage done in the act of cutting; and as shown overwhelmingly by the evidence, the land with the cedars removed is enhanced in actual value.

Surely, the Legislature of Virginia in 1914, was not actuated by improper motives in enacting this law that places no burden of expense upon the cedar tree owner to abate the nuisance upon his own land, nor were subsequent legislatures guilty of wrong doing in amending the Act in 1920, 1922, and 1924, instead of repealing it; nor does the Act as construed provide for a mere arbitrary or capricious exercise of the police power bitrary or capricious exercise of the police power of the state, as contended by the plaintiffs-in-error.

The court in American Railway Express Co. v. Kentucky, U. S. , 71 L. Ed. (adv. 457) plainly expressed the conditions under which interference would be made as follows:

> "We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for

the protection and enforcement of private rights.'"

The annotation to Bowman v. Entomologist, 12 Am. L. R., 1138, 1143, furnishes, it is believed, a satisfactory answer to this specification of error where the following cases are quoted:

Balch v. Glenn (Kans.) 43 L. R. A. (N. S.) 1080 (providing for the ***extermination of San Jose Scale and other orchard pests at the owners' expense):*** Los Angeles County v. Spencer, (Cal.) 77 Am. St. R., 217 ***(making the expense of abating the nuisance a lien upon the premises of the owner);*** State v. Main (Conn.) 36 L. R. A. 623, ***(providing for the destruction of peach trees affected with Yellows, without compensation);*** Colvill v. Fox (Mont.) L. R. A. 1915 F 894 ***(holding the destruction of fruit lawful for the protection of others);*** Carstens v. DeSellem, 144 Pac. 934 ***(holding destruction without notice of pear trees affected by fire blight lawful);*** Los Angeles Berry Growers Co-Op. Assn. v. Huntly, 146 Pac. 373; Louisiana State Board v. Tanzmann, L. R. A. 1917 C 894 ***(holding the destruction of orange groves affected by canker, without compensation, lawful).***

In conclusion, it is submitted that plaintiffs-in-error have not shown that the Cedar Rust Law is repugnant to Sec. 1, of the Fourteenth Amendment to the Federal Constitution; but that on the

contrary it affirmatively appears the act provides for a reasonable exercise of the police power of the state.

Respectfully submitted,

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